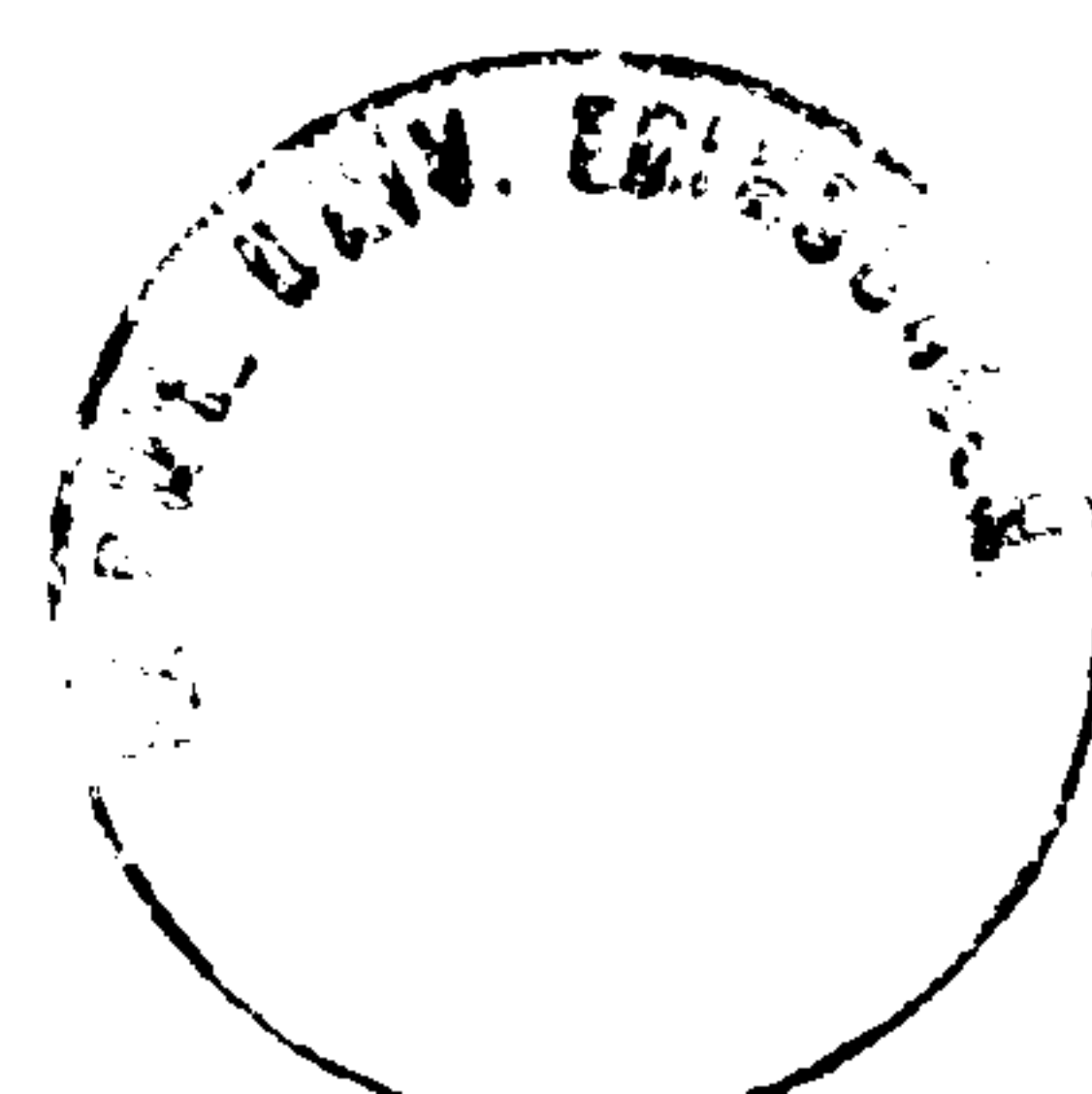


**Arbitration
as a means of settling commercial disputes
(national and international)
with special reference to the Kingdom
of Saudi Arabia**

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**Ph.D.
University of Edinburgh
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UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS

(Regulation 3.5.10)

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Arbitration is discussed in this thesis as a means of resolving disputes between private parties. The national arbitration laws of various countries, such as Dutch, French and English laws are discussed as are institutional rules of international arbitration, such as the ICC Arbitration Rules and the UNCITRAL Model Law. The thesis concentrates on the position of the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

The thesis is divided into seven chapters. Chapter one gives a general view of the nature and sources of the Saudi legal system and of the institutions of the judiciary, such as the *Sharīah* Courts, the Board of Grievances and the specialised judicial organs. The periods of the development of arbitration in the Kingdom of Saudi Arabia and the types of arbitration, whether an *ad hoc* or an institutional arbitration, or a domestic or an international arbitration are discussed in chapter two.

In chapters three to seven, the thesis discusses and compares the position of the national arbitration laws, the international and institutional rules of arbitration, and the position in the Kingdom of Saudi Arabia in the light of the Arbitration Regulation of 1983 and its Implementation Rules of 1985 in respect of the main stages of the arbitral process. Chapter three deals with the arbitration agreement, whether an arbitration clause or a submission agreement, the provisions on the validity of the arbitration agreement, such as agreement in writing, capacity of the parties to the dispute and arbitrability, and the effects of the existence of an arbitration agreement.

Major aspects concerning arbitrators, such as their number, appointment, qualifications, powers, duties, challenge and fees are treated in chapter four. Chapter five is devoted to discussing the main matters relating to the arbitration proceedings, such as commencement of the arbitration proceedings, the law governing these proceedings, place and language of arbitration, representation of the parties to the dispute, the sessions of arbitration, presence and absence of the parties, amiable composition, written statements, evidence, hearings, court assistance and closure of hearings.

Chapter six deals with the arbitral award, such as the way of its making, its types, contents, reasons, signature, registration and notification, correction and interpretation, and finality. Challenge, recognition and enforcement of the arbitral award, whether a national or a foreign award, are discussed in detail in the last chapter of this thesis. The thesis ends with a summary and conclusion containing some recommendations to the Saudi legislator to issue a new arbitration regulation or at least revise and review the provisions of the present Arbitration Regulation and its Implementation Rules for dealing with the recent changes in the commercial sphere and business community.

Finally, the thesis contains in a separate appendix brief details of cases brought to arbitration in the Kingdom of Saudi Arabia since 1986 translated into English.

DEDICATION

To My Parents, Wife
and Sons; Ibrahim and Abdul Rahman

DECLARATION

I hereby declare that this thesis has been composed by myself alone and that the work which enabled it to be produced was carried out by myself alone.

Mhaidib I. AL-MHAIDIB

07/03/1997

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* The Hon Lord Dervaird, Dean of the Faculty of Law and a Dickson Minto Professor of Company and Commercial Law in the University of Edinburgh.

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Table of Contents

Abstract.....	I
Dedication.....	II
Declaration.....	III
Acknowledgement.....	IV
Introduction.....	1
Table of Transliteration.....	7

Chapter one: Saudi Legal and Judicial Systems.....	8
1.1 Saudi Legal System.....	8
1.1.1 Background.....	8
1.1.2 Nature of the Legal System.....	10
1.1.3 Sources of the Legal System.....	15
1.1.3.1 The <i>Shar'ah</i> (Islamic Law).....	15
1.1.3.1[i] The principal sources.....	15
1.1.3.1[i][A] <i>The Kur'an</i>	15
1.1.3.1[i][B] <i>The Sunnah</i>	16
1.1.3.1[i][C] <i>The Idjmā'</i> (consensus of the opinions)....	16
1.1.3.1[i][D] <i>The Kiyās</i> (analogy).....	17
1.1.3.1[ii] The supplementary sources.....	17
1.1.3.1[iii] Minimum standards of the <i>Shar'ah</i>	17
1.1.3.1[iii][A] Substantive matters.....	18
1.1.3.1[iii][B] Procedural matters.....	19
1.1.3.2 State Regulations and Resolutions.....	20
1.1.3.2[i] Constitutional and Administrative Regulations.....	21
1.1.3.2[i][A] The Basic Regulation.....	21
1.1.3.2[i][B] The consultative Council Regulation.....	22
1.1.3.2[i][C] The Provincial Government Regulation.....	22
1.1.3.2[i][D] The Council of Ministers Regulation.....	23
1.1.3.2[i][E] The Civil Service Regulation.....	23
1.1.3.2[ii] The Commercial Regulations.....	24
1.1.3.2[ii][A] The Commercial Court Regulation.....	24
1.1.3.2[ii][B] The Investment of Foreign Capital Regulation.....	24
1.1.3.2[ii][C] The Companies Regulation.....	25
1.1.3.2[ii][D] Other Commercial Regulations.....	26
1.1.3.2[iii] Labour and Social Securities Regulations.....	26
1.1.3.2[iii][A] The Labour and Workmen Regulation.....	26
1.1.3.2[iii][B] The Social Securities Regulation.....	26
1.1.3.2[iv] Criminal Regulations.....	27
1.1.3.2[v] Tax Regulations.....	27

1.1.3.2[vi] Other Regulations.....	27
1.1.3.3 International Treaties.....	28
1.1.3.4 Custom and Practice.....	28
2.2 Saudi Judicial System.....	30
1.2.1 Institutions of Judiciary.....	31
1.2.1.1 <i>The Sharfah</i> Courts.....	31
1.2.1.1[i] Summary Courts.....	32
1.2.1.1[ii] General Courts.....	33
1.2.1.1[iii] Appeal Courts.....	33
1.2.1.1[iv] The Supreme Judicial Council.....	34
1.2.1.1[iv][A] Permanent Committee.....	34
1.2.1.1[iv][B] General Committee.....	35
1.2.1.2 The Board of Grievances (Administrative Court).....	35
1.2.1.3 The Specialised Judicial Organs.....	38
1.2.1.3[i] The Commission for the Settlement of Commercial Disputes (CSCD).....	39
1.2.1.3[ii] The Commercial Paper Committee (CPC).....	41
1.2.1.3[iii] The Committee for the Settlement of Banking Disputes (CSBD).....	42
1.2.1.3[iv] Customs Committees(CC).....	43
1.2.1.3[v] The Committees for the Settlement of Labour Disputes(CSLD).....	43
1.2.1.3[vi] Other Specialised Judicial Organs.....	44

Chapter two: Development and Types of Arbitration in the Kingdom of Saudi Arabia.....45

2.1 Development of arbitration in the Kingdom of Saudi Arabia...	45
2.1.1 Introduction.....	45
2.1.1.1 Reasons for resorting to arbitration.....	46
2.1.1.2 Nature of arbitration.....	47
2.1.1.2[i] The contractual theory.....	47
2.1.1.2[ii] The jurisdictional theory.....	49
2.1.1.2[iii] The mixed or hybrid theory.....	49
2.1.1.2[iv] The autonomous theory.....	50
2.1.1.2[v] The position in the Kingdom of Saudi Arabia.....	51
2.1.2 Development of arbitration in the Kingdom of Saudi Arabia.....	51
2.1.2.1 Development of arbitration regarding private parties.....	54
2.1.2.1[i] The Commercial Court Regulation of 1931.....	54
2.1.2.1[ii] The Labour and Workmen Regulation of 1969.....	56
2.1.2.1[iii] The Chamber of Commerce and Industry of 1980.....	56
2.1.2.1[iv] The Arbitration Regulation of 1983.....	57

2.1.2.2 Development of arbitration regarding the Government or one of its Agencies.....	59
2.2 Types of Arbitration.....	63
2.2.1 <i>Ad hoc</i> and Institutional arbitrations.....	63
2.2.1.1 <i>Ad hoc</i> arbitration.....	63
2.2.1.2 Institutional arbitration.....	64
2.2.1.2[i] A member of a Saudi Chamber of Commerce and Industry.....	66
2.2.1.2[ii] A foreigner having a dispute with a member of a Saudi Chamber of Commerce and Industry.....	67
2.2.2 Domestic and international arbitrations.....	70
2.2.2.1 Domestic arbitration.....	70
2.2.2.2 International arbitration.....	71
2.2.2.2[i] Aramco Case.....	73
2.2.2.2[i][A] Questions submitted by the Saudi Government.....	74
2.2.2.2[i][B] Questions submitted by Aramco.....	74
2.2.2.2[i][C] The law to be applied.....	75
2.2.2.2[i][C](i) The opinion of the Arbitration Tribunal.....	76
2.2.2.2[i][D] The arbitral award.....	78
2.2.2.2[i][D](i) Questions submitted by the Saudi Government.....	79
2.2.2.2[i][D](ii) Questions submitted by Aramco.....	79
2.2.2.2[ii] The Resolution No. 58.....	80
2.2.2.2[iii] The Agreement with the American Overseas Private Investment Corporation (OPIC).....	82
2.2.2.2[iv] The Convention on the Settlement of Investment Disputes of 1965.....	83
2.2.2.2[v] The New York Convention of 1958.....	84
 Chapter three: The Arbitration Agreement.....	 86
3.1 Form and contents of the arbitration agreement.....	86
3.1.1 Submission Agreement.....	87
3.1.2 Arbitration Clause.....	88
3.1.2.1 Separability of the arbitration clause.....	90
3.1.3 The position in the Kingdom of Saudi Arabia.....	91
3.1.3.1 Submission agreement.....	92
3.1.3.2 Arbitration clause.....	94
3.1.3.2[i] Before the issue of the Arbitration Regulation of 1983.....	94
3.1.3.2[ii] After the issue of the Arbitration Regulation of 1983.....	95
3.1.3.2[iii] Separability of the arbitration clause.....	99
3.2 Provisions as to the validity of the arbitration agreement.....	102

4.3.4.3 Impartiality and independence.....	152
4.4 Powers of Arbitrators.....	155
4.4.1 Powers granted by the parties.....	155
4.4.2 Powers granted by the applicable law.....	156
4.4.3 The position in the Kingdom of Saudi Arabia.....	158
4.5 Duties and Liabilities of Arbitrators.....	160
4.5.1 Duties of arbitrators.....	160
4.5.2 Liabilities of arbitrators.....	162
4.5.3 The position in the Kingdom of Saudi Arabia.....	165
4.6 Dismissal and Challenge of Arbitrators.....	167
4.6.1 Dismissal of arbitrators.....	167
4.6.2 Challenge of arbitrators.....	168
4.6.2.1 Reasons for challenge.....	169
4.6.2.2 Time limits for challenge.....	171
4.6.2.3 Procedure for challenge.....	173
4.6.2.4 Effects resulting from challenge.....	174
4.6.2.5 Filling a vacancy.....	175
4.6.3 The position in the Kingdom of Saudi Arabia.....	176
4.6.3.1 Dismissal of arbitrators.....	176
4.6.3.2 Challenge of arbitrators.....	178
4.7 Fees and expenses of Arbitrators.....	181
4.7.1 Amount of the fees and expenses.....	182
4.7.2 Methods of assessing the fees and expenses.....	182
4.7.2.1 Fees of arbitrators.....	182
4.7.2.2 Expenses of the arbitral tribunal.....	183
4.7.3 The position in the Kingdom of Saudi Arabia.....	184
 Chapter five: The Arbitration Proceedings.....	 186
5.1 Commencement of the arbitration proceedings.....	187
5.1.1 Request for arbitration.....	187
5.1.1.1 The position in the Kingdom of Saudi Arabia.....	191
5.1.2 Notifications of the parties.....	192
5.1.2.1 The position in the Kingdom of Saudi Arabia.....	193
5.2 The law governing the arbitration proceedings.....	196
5.2.1 The position in the Kingdom of Saudi Arabia.....	198
5.3 Place of arbitration.....	200
5.3.1 The position in the Kingdom of Saudi Arabia.....	202
5.4 Language of arbitration.....	204
5.4.1 The position in the Kingdom of Saudi Arabia.....	205
5.5 Representation of the parties.....	207
5.5.1 The position in the Kingdom of Saudi Arabia.....	208

5.6 The sessions; administration and record	210
5.6.1 Dates of the sessions.....	210
5.6.2 Basic principles.....	210
5.6.3 Functions of the chairman of the arbitral tribunal.....	211
5.6.4 Translation.....	212
5.6.5 Transcripts of the sessions.....	212
5.6.6 Secretary or registrar of arbitration.....	214
5.6.7 The position in the Kingdom of Saudi Arabia.....	215
5.7 Presence and absence of the parties	218
5.7.1 The position in the Kingdom of Saudi Arabia.....	219
5.8 Amiable composition	221
5.8.1 The position in the Kingdom of Saudi Arabia.....	222
5.9 Written statements	224
5.9.1 The position in the Kingdom of Saudi Arabia.....	226
5.10 Evidence	228
5.10.1 Production of the documents.....	230
5.10.2 Testimony of the witnesses.....	233
5.10.3 Opinions of the experts.....	238
5.10.4 Inspection of the subject-matter of the dispute.....	240
5.10.5 The position in the Kingdom of Saudi Arabia.....	242
5.10.5.1 Production of the documents.....	242
5.10.5.2 Testimony of the witnesses.....	244
5.10.5.3 Opinions of the experts.....	245
5.10.5.4 Inspection of the subject-matter of the dispute.....	246
5.11 Hearings	248
5.11.1 The position in the Kingdom of Saudi Arabia.....	249
5.12 Court assistance	251
5.12.1 Interim measures of protection.....	251
5.12.2 The supportive function.....	253
5.12.3 The supervisory function.....	254
5.12.4 The position in the Kingdom of Saudi Arabia.....	255
5.12.4.1 At the outset of the arbitration.....	255
5.12.4.2 During the arbitration proceedings.....	256
5.12.4.3 At the end of the arbitration.....	257
5.13 Closure of the hearings	259
5.13.1 The position in the Kingdom of Saudi Arabia.....	260
 Chapter six: The Arbitral Award	 262
6.1 Making of the award	263
6.1.1 Deliberations.....	263
6.1.1.1 The position in the Kingdom of Saudi Arabia.....	266

6.1.2 Majority vote.....	267
6.1.2.1 The position in the Kingdom of Saudi Arabia.....	270
6.1.3 Time Limits.....	272
6.1.3.1 The position in the Kingdom of Saudi Arabia.....	277
6.2 Types of the award.....	280
6.2.1 Interim and partial awards.....	280
6.2.1.1 Interim award.....	281
6.2.1.2 Partial award.....	283
6.2.2 Final award.....	286
6.2.3 Additional award.....	287
6.2.4 Other awards.....	288
6.2.5 The position in the Kingdom of Saudi Arabia.....	289
6.3 Form and contents of the award.....	291
6.3.1 Recitals.....	293
6.3.2 Language of the award.....	294
6.3.3 Award in writing.....	294
6.3.4 Date and place of the award.....	295
6.3.5 Reasons for the award.....	296
6.3.6 Signature of the award.....	297
6.3.7 Other requirements.....	298
6.3.8 The position in the Kingdom of Saudi Arabia.....	298
6.4 Reasons for the award.....	300
6.4.1 The position in the Kingdom of Saudi Arabia.....	304
6.5 Signature of the award.....	306
6.5.1 Reasons for missing the signature.....	308
6.5.2 Dissenting opinions.....	309
6.5.2.1 Advantages and disadvantages of dissenting opinions.....	310
6.5.2.2 Methods of making of dissenting opinions.....	311
6.5.3 The position in the Kingdom of Saudi Arabia.....	311
6.6 Registration and notifications of the award.....	314
6.6.1 Registration of the award.....	314
6.6.2 Notification of the award.....	317
6.6.3 The position in the Kingdom of Saudi Arabia.....	319
6.6.3.1 Registration of the award.....	319
6.6.3.2 Notification of the award.....	321
6.7 Correction and Interpretation of the award.....	323
6.7.1 Correction of the award.....	323
6.7.2 Interpretation of the award.....	326
6.7.3 The position in the Kingdom of Saudi Arabia.....	330
6.7.3.1 Correction of the award.....	330
6.7.3.2 Interpretation of the award.....	331
6.8 Finality of the award.....	333

6.8.1 The position in the Kingdom of Saudi Arabia.....	334
Chapter seven: Challenge, recognition and enforcement of the arbitral award.....	336
7.1 Introduction.....	338
7.2 Challenge of the arbitral award.....	340
7.2.1 Challenge of the national arbitral awards.....	340
7.2.1.1 Waiver of challenge.....	341
7.2.1.2 Competent authority to decide the challenge.....	343
7.2.1.3 Reasons for challenge.....	345
7.2.1.4 Methods of challenge.....	346
7.2.1.4[i] Setting aside of the arbitral award.....	346
7.2.1.4[ii] Review of the arbitral award.....	347
7.2.1.5 Time Limits for challenge.....	350
7.2.1.6 Procedure for challenge.....	353
7.2.1.7 Effects resulting from challenge.....	353
7.2.1.8 Other questions concerning challenge.....	356
7.2.1.9 Res judicata.....	357
7.2.2 Challenge of the foreign arbitral awards.....	358
7.2.2.1 Waiver of the challenge.....	360
7.2.2.2 Competent authority to decide the challenge.....	361
7.2.2.3 Reasons for challenge.....	363
7.2.2.4 Time limits for challenge.....	365
7.2.2.5 Procedure for challenge.....	367
7.2.2.6 Effects resulting from challenge.....	367
7.2.3 The position in the Kingdom of Saudi Arabia.....	369
7.3 Recognition and enforcement of the arbitral award.....	376
7.3.1 Recognition of the arbitral award.....	377
7.3.2 Enforcement of the arbitral award.....	378
7.3.2.1 Enforcement of the national arbitral awards.....	378
7.3.2.1[i] Competent authority to issue an enforcement order.....	378
7.3.2.1[ii] Procedure for issuing an enforcement order.....	380
7.3.2.1[iii] Reasons for refusing to issue an enforcement order.....	381
7.3.2.1[iv] Time limits for making of an enforcement order.....	382
7.3.2.1 [v] Appeal of the decision of the competent authority.....	383
7.3.2.2 Enforcement of the foreign arbitral awards.....	384
7.3.2.2[i] Place of enforcement.....	385
7.3.2.2[ii] Competent authority to issue an enforcement order.....	385
7.3.2.2[iii] Procedure for issue of an enforcement order.....	386
7.3.2.2[iv]Reasons for refusing to issue an enforcement order.....	387
7.3.2.2[v] Time limits for issuing an enforcement order.....	388
7.3.2.2[vi] Appeal of the decision of the competent authority.....	389
7.3.2.2[vii] The role of the international conventions and rules of arbitration.....	390

7.3.2.2[vii][A] The UNCITRAL Model Law of 1985.....	391
7.3.2.2[vii][A](i) Formalities.....	391
7.3.2.2[vii][A](ii) Refusal of enforcement.....	391
7.3.2.3 The position in the Kingdom of Saudi Arabia.....	392
7.3.2.3[i] Enforcement of Saudi Arbitral awards.....	392
7.3.2.3[ii] Enforcement of foreign arbitral awards.....	394
7.3.2.3[ii][A] Enforcement without an international convention.....	395
7.3.2.3[ii][B] Enforcement according to an international convention.....	396
7.3.2.3[ii][B](i) The Arab League Convention of 1952.....	397
7.3.2.3[ii][B](i)(a) Scope of the Convention.....	397
7.3.2.3[ii][B](i)(b) Procedure for enforcement of foreign arbitral awards.....	397
7.3.2.3[ii][B](i)(c) Reasons for refusal of enforcement of the award....	398
7.3.2.3[ii][B](ii) The Washington Convention of 1965.....	399
7.3.2.3[ii][B](iii) The New York Convention of 1958.....	403
7.3.2.3[ii][B](iii)(a) Scope of application of the Convention.....	403
7.3.2.3[ii][B](iii)(b) Reservations.....	404
7.3.2.3[ii][B](iii)(c) Formalities and procedures.....	405
7.3.2.3[ii][B](iii)(d) Refusal of enforcement.....	406
7.3.2.3[ii][B](iii)(d)(i) Grounds that may be involved by the respondent.....	406
7.3.2.3[ii][B](iii)(d)(ii) Grounds that may be involved by the Board of Grievances.....	408
 Summary and Conclusion.....	 410
 Bibliography.....	 430
 Table of Appendices.....	 441
 Appendix 1: Table of Cases	 442
Appendix 2: Summary of the recommendations.....	452

Appendix 3: The Saudi Arbitration Regulation of 1983.....454

Appendix 4: The Implementation Rules of the Arbitration Regulation of 1985.....458

Appendix 5: The Articles concerning the arbitration mentioned in the Saudi Commercial Court Regulation of 1931.....467

Appendix 6: The Articles concerning the arbitration mentioned in the Saudi Labour and Workmen Regulation of 1969.....468

Appendix 7: The Articles concerning the arbitration mentioned in the Saudi Chambers of Commerce and Industry Regulation of 1980.....469

Appendix 8: The Articles concerning the arbitration mentioned in the Implementation Rules of the Saudi Chambers of Commerce and Industry of 1981.....470

Appendix 9: The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.....471

Appendix 10: The Washington Convention on the Settlement of Investment Disputes between States and National of Other States of 1965.....476

Appendix 11: The Convention of the Arab League of Nations concerning the Enforcement of Foreign Judgments and Awards of 1952.....493

Introduction

The concept of arbitration was known from very early time as a method of resolving disputes in primitive communities. Today, arbitration is of particular importance amongst the business community. This community needs a means for settling its disputes promptly, fairly and economically. Negotiations and conciliation may lead to an agreement and this is desirable. However, when the parties to the dispute are unable to reach an agreement some mechanism is needed to settle their disputes. In such case, the parties have effectively only two alternatives; either through arbitration or litigation.

In fact, the business community finds that arbitration has advantages over litigation in most situations. The main advantages can be summarised as follows:

- Arbitration is often faster and more expeditious than litigation.
- Courts have heavy work loads and years may pass before there is a final judgment.
- The parties often save time and money when they have recourse to arbitration because arbitration improves the administration of justice by reducing the procedural formalism and delay.
- Arbitration is more private than litigation, thus making it easier for the parties to maintain commercial relationships.
- In arbitration, the parties can choose the place, language and procedure of arbitration, arbitrators and so on, in advance by making an agreement unlike the position in litigation.
- Arbitrators chosen by the parties or recognised by one of the specialist arbitral institutions often have more knowledge of the subject-matter of the dispute than a judge or judges would have.
- The parties have the right to specify the scope of the dispute to be submitted to arbitration. For example, the parties may agree that only technical disputes will be settled by arbitration.
- Enforcement of a foreign arbitral award in a country other than where this award is made is often less difficult than enforcement of a foreign judgment.

For these and other reasons, businessmen prefer not to refer their disputes to courts, but to seek the arbitration alternative as a flexible and effective mechanism to settle their disputes.

There are several other factors which led me to choose arbitration with special reference to the Kingdom of Saudi Arabia as the subject of this thesis.

Firstly, the increasing trend of Saudi Government and businessmen alike to resort to arbitration as a means of resolving disputes. For instance, in 1994, the Kingdom of Saudi Arabia ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Secondly, the academic policy of the Law Department at King Saud University in Riyadh requires each demonstrator to determine his field of specialisation before starting his higher studies according to the needs of the Department. Consequently, I chose the area of commercial and civil procedure, particularly the mechanisms for settlement of disputes arising between private parties.

Thirdly, the lack of academic studies concerning the judicial and legal systems of the Kingdom of Saudi Arabia, especially studies relating to the arbitration law led me to opt for arbitration as a means of settling disputes as the subject of this thesis with particular concentration on the Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985.

This thesis discusses the various stages of the arbitral process from the start of the dispute to the enforcement of the arbitral award. In general, it first sets forth and compares the positions of the national arbitration laws of different countries, such as Dutch, French and English laws, and international and institutional rules of arbitration, such as the ICC Arbitration Rules, the LCIA Arbitration Rules and the UNCITRAL Model Law.

Secondly, it analyses and examines the position in the Kingdom of Saudi Arabia according to the provisions of the Arbitration Regulation of 1983 and its Implementation Rules of 1985, and explains the practical reality prevailing in the Kingdom of Saudi Arabia by reference to many arbitral awards which have been collected from the Saudi Chambers of Commerce and Industry, especially Riyadh Chamber of Commerce and Industry, and Jeddah Chamber of Commerce and Industry.

In particular, this work attempts to examine the provisions of the Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985, to see whether these Regulation and Rules are developed laws dealing with the arbitration as a method of resolving disputes similar to the arbitration laws of developed countries and to give some relevant suggestions for modifying and revising the Regulation and Rules.

This thesis is divided into seven chapters. Chapter one gives a general view of the Saudi legal and judicial systems because the Arbitration Regulation of 1983 and its Implementation Rules of 1985 are considered as a part of the Saudi legal system. Therefore, arbitration is one of the chosen methods of settling disputes in the Kingdom of Saudi Arabia. The first section of this chapter deals with the Saudi legal system, particularly its nature and sources, such as *the Sharī'ah* (Islamic law), State regulations and resolutions, international treaties, and custom and practice. The Saudi judicial system, especially the kinds of the institutions of judiciary, such as *the Sharī'ah* Courts, the Board of Grievances and the specialised judicial organs is examined in the second section of this chapter.

Chapter two is divided into two sections where the first section discusses the periods of the development of arbitration since the establishment of the Kingdom of Saudi Arabia up to the present time, and it sets forth the various attitudes of the Saudi Government from arbitration as a means of resolving disputes and its reasons during these periods. The second section is devoted to explaining the types of arbitration, whether an *ad hoc* or an institutional arbitration, a domestic or an international arbitration.

Chapter three treats the issues concerning the arbitration agreement. It is divided into three sections. The first section generally sets forth the form and content of the arbitration agreement, whether an arbitration clause or a submission agreement, and the concept of the separability of the arbitration clause. It also discusses in detail the recognition of the Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985 in the different types of the arbitration agreement, particularly the arbitration clause mentioned in the main contract before the appearance of the dispute.

The main provisions as to the validity of the arbitration agreement, such as agreement in writing, capacity of the parties to the dispute and arbitrability are the

subject of the second section of this chapter. This section raises some questions and attempts to answer them, such as the validity of the arbitration agreement concluded by modern systems of communication, such as fax or orally. It also discusses these questions according to the Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985, and tries to give certain answers and suggestions in respect of the aspects which are not treated by the Regulation and its Rules.

The third section of this chapter discusses the effects of the existence of an arbitration agreement, especially its major effect relating to the refusal of the competent authority, such as the courts, to decide the dispute in the presence of an arbitration agreement, whether a submission agreement or an arbitration clause.

Chapter four covers the main aspects concerning the arbitrators themselves, such as their number and the methods of their appointment where the parties to the dispute have the right to choose and appoint the members of the arbitral tribunal by themselves or by giving this right to a third party, such as a specialist arbitral institution. As well, this chapter discusses the major qualifications required in a person who wishes to act as an arbitrator, for instance he must have a full legal capacity by which he is capable of conducting the arbitral process, he should have an experience in dealing with the subject-matter of the dispute referred to arbitration, and he must be and remain impartial and independent throughout the arbitral process.

This chapter also explains the powers of arbitrators granted by the parties to the dispute and by the law governing arbitration, their duties and liabilities, their dismissal and challenge, particularly the reasons for challenge, its time limits, procedure and effects resulting from the challenge, and the fees and expenses of arbitrators with concentration on the methods of assessing these fees and expenses.

Chapter five, which constitutes a large part of this work, discusses the main aspects of the arbitration proceedings, such as the commencement of arbitration by submitting a request for arbitration by the claimant and notifying this request to the respondent, the law governing these proceedings, the place and language of arbitration, the representation of the parties before the arbitral tribunal, the method of administration of the arbitration sessions, the presence and absence of the parties, the possibility of amiable composition, the submission of written statements, the major means of evidence, specially the production of documents, the testimony of witnesses,

the opinions of experts and the inspection of the subject-matter of the dispute, and the method of holding hearings.

This chapter also discusses the functions of the competent authority, such as the courts to assist the arbitral tribunal to make progress in the arbitral process, such as the issue of interim measures of protection. Finally, it deals with the closure of the hearings.

The main issues relating to the arbitral award are discussed in chapter six. The first section is devoted to set forth the way in which the arbitral award is made. It is divided into three sub-sections. The first deals with certain important aspects concerning how the award is made, such as the deliberations, majority vote and time limits. The types of the arbitral award, such as interim award, partial award, final award, additional award and consent award are examined in the second section of this chapter.

Form and contents of the arbitral award are covered in the third section which discusses the most important formalities required in the arbitral award, such as the recitals, award in writing, language, place, date, reasons and signature of the award. As well, reasons and signature of the arbitral award are analysed in detail in two particular sections of this chapter. Registration of the arbitral award and its notification to the parties to the dispute, its correction and interpretation and when the arbitral award becomes a final award are discussed in the last three sections.

Chapter seven discusses challenge, recognition and enforcement of the arbitral award, whether a national or a foreign award. It first attempts to distinguish between what is meant by national and foreign arbitral awards. After that, challenge of the arbitral award is examined in special section where it is divided into three sub-sections which treat challenge of the national arbitral awards, challenge of foreign arbitral awards and the position of the Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985 from challenge of the arbitral award, whether a Saudi or a foreign award.

Recognition and enforcement of the arbitral award, whether a national or a foreign award are discussed in the third section of this chapter which concentrates on the role of the international conventions and the rules of arbitration concerning the recognition and enforcement of foreign arbitral awards, such as the New York

Convention of 1958 and the UNCITRAL Model Law of 1985. Moreover, this section has a sub-section setting forth the position in the Kingdom of Saudi Arabia in respect of the matter of enforcement of the arbitral award, whether a Saudi or a foreign award.

In the summary and conclusion, I have summarised these chapters and with the modest experience that I have had in the subject, over the last few years, I was able to put forward some recommendations for changes in the existing Arbitration Regulation in the Kingdom of Saudi Arabia so as to make it appropriate to the recent development in trade and business.

Finally, at the end of this thesis, there are eleven appendices where one of them, Appendix one, contains a brief details of cases decided by arbitration in the Kingdom of Saudi Arabia since 1986 translated into English.

In relation to some Arabic terms used in this work, the separate table of transliteration is given on page number 7.

Table of Transliteration

In this thesis, the transliteration system from Arabic into English alphabet used by the Encyclopaedia of Islam, The New Edition, published by E. J. Brill, 1986 has been adopted. Therefore, the following characters are used:

Consonants:

ع	'	د	d	ض	ḍ	ك	k
ب	b	ذ	<u>dh</u>	ط	ṭ	ل	l
ت	t	ر	r	ظ	ẓ	م	m
ث	<u>th</u>	ز	z	ع	'	ن	n
ج	<u>dj</u>	س	s	غ	<u>gh</u>	ه	h
ح	ḥ	ش	<u>sh</u>	ف	f	و	w
خ	<u>kh</u>	ص	ṣ	ق	q	ي	y

Long Vowels:

أُ	ā	و	ū	ي	ī
----	---	---	---	---	---

Short Vowels:

ا	a	u	u	ي	i
---	---	---	---	---	---

Diphthongs:

اَو	aw	اَي	ay
-----	----	-----	----

يَي	iiy (final form ī)	وَو	uww (final form ū)
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أل	al-
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Chapter one

Saudi Legal and Judicial Systems

This chapter will deal with certain aspects of concern to the Kingdom of Saudi Arabia. It is desirable to clarify certain basic aspects regarding the Kingdom of Saudi Arabia, particularly the legal and judicial systems before dealing with arbitration in the Kingdom of Saudi Arabia which will be the subject of this thesis. This chapter will be divided into two sections. The first section will concentrate on the legal system of the Kingdom of Saudi Arabia, particularly its nature and sources. The Saudi judicial system will be treated in the second section.

1.1 Saudi Legal System

1.1.1 Background

The Kingdom of Saudi Arabia occupies approximately 80% of the total area of the Arabian Peninsula and its population is about 12 million, excluding foreigners.¹ It is bounded on the east by the Arabian Gulf, Kuwait, Bahrain, Qatar and the Arab United Emirates, on the north by Iraq and Jordan, on the west by the Red Sea, and on the south by Yemen and Oman.²

The Kingdom of Saudi Arabia is divided into several administrative provinces. The most major provinces are the Central Province, *Nadjd*, in which Riyadh, the capital, is located; the Western Province, *al-Ḥijāz*, the main cities of which are *Makkah*, Jeddah and *al-Madīnah*; the Eastern Province, *al-Aḥsā'*, with its provincial capital *al-Dammām*; and the Southern Province, *ʿAsīr*, the provincial

¹ The recent census was made in 1992.

² AL-FARSY, Fouad., *Saudi Arabia; a case study in development*, London, Kegan Paul Inc Ltd, 1986, p. 26.

capital which is *Abhā*.

Before discussing the legal system of the Kingdom of Saudi Arabia, a brief outline of the Kingdom's history may be useful.

The history of the Kingdom of Saudi Arabia may be divided into three significant periods. The first period began in the mid-eighteenth century when Prince *Muḥammad Ibn Sa'ūd*, the Ruler of *al-Dir'iyyah*,³ entered into an alliance with *Muḥammad Ibn 'Abd al-Wahhāb*, Islamic scholar, who started an Islamic reform movement. He called all Muslims to return to the principles of true and pure Islamic faith and to abandon the innovations (*bid'ah*) prevailing in many parts of the Islamic World. This alliance was one of the most important factors which led to the unification of most of the Arabian Peninsula as the Kingdom of Saudi Arabia.⁴

The Reform Movement spread to most parts of the Arabian Peninsula. Prince *Muḥammad Ibn Sa'ūd* conquered *al-Ḥijāz* in 1806 and established the First Saudi State, which continued until the Egyptian Army invaded and destroyed *al-Dir'iyyah* in the early part of the nineteenth century.

The second period started with the reign of Prince *Turkī Ibn 'Abd allāh* who established the Second Saudi State in 1818, and he chose Riyadh as the capital. He dominated certain parts of the Arabian Peninsula. However, the continuous conflicts among his descendants were one of the most important factors which enabled *al-Rashīd* Family to capture Riyadh and end the Second Saudi State in 1891.

The Third period is the most significant period of Saudi rule. It began in the early twentieth century when King *'Abd al-'Aziz*, a direct descendant of Prince *Muḥammad Ibn Sa'ūd*, conquered and unified most of the Arabian Peninsula, including, Riyadh in 1900, *al-'Aḥsā'* (the Eastern Province) in 1913 and *al-Ḥijāz* (the Western Province) in 1924.

In September 1932,⁵ the present Kingdom of Saudi Arabia was founded by

³ *Al-Dir'iyyah* is now a small town near Riyadh in the Central Province of the Kingdom of Saudi Arabia.

⁴ HUMPHREYS, Stephen R., *Islam and Political Values in Saudi Arabia, Egypt and Syria*, 1979, vol. 33, The Middle East Journal, p. 8.

⁵ The Royal Decree No. 2716, dated 17/05/1351 A.H.(18/09/1932 A.D.).

King 'Abd al-'Aziz al-Sa'ūd who ruled it until his death in 1953. He was succeeded by his eldest son, King Sa'ūd. However, he abdicated in 1964 in favour of his brother King Fayṣal who was assassinated in 1975. Fayṣal's brother King Khālīd took over the Crown in 1975 and after his death in 1982, the present King *Fahd* succeeded to the throne.

1.1.2 Nature of the legal system

The Kingdom of Saudi Arabia is an absolute monarchy and all legislative and executive powers are concentrated in the Council of Ministers subject to the absolute authority of the King. It has been described as follows:

" An independent monarchy combining religious and political leadership in the role of the King, whose authority is based on Islamic law. Legislation is royal decrees or ministerial regulations. The King acts as a prime minister and commander-in- chief of the armed forces and police, with an appointee Council of Ministers that advises him."⁶

This sub-section is an attempt to clarify and discuss the development of the Saudi legal system. The Kingdom of Saudi Arabia is one of the very few Islamic Countries in which *the Sharī'ah*, Islamic Law, applies and prevails.

After King 'Abd al-'Aziz took control of most of the Arabian Peninsula, he found himself faced with the existence of three different legal systems.⁷

The first system, which existed in *al-Ḥijāz*, was influenced by the Ottoman Laws derived from the European Laws, particularly the French, German and Swiss Laws. The Ottoman Empire dominated *al-Ḥijāz* which is deemed to be the heart of the Islamic World because the two holy cities in Islam, *Makkah* and *al-Madīnah*, are situated in *al-Ḥijāz*.

⁶ WALPOLE, Norman C., *Area Handbook for Saudi Arabia*, Washington D. C. ,The American University, 1971, p. XLII.

⁷ SOLAIM, Soliman A., *Saudi Arabia's Judicial System*, 1971, vol. XXV, The Middle East Journal, p. 403.

The second system was that of the small towns of *Nadjd*. Under this system, the local *Amīr* (Governor) and a single judge were responsible for the settlement of disputes arising between persons. The *Amīr* would firstly try to conciliate the parties. If he failed, he would refer them to the judge whose decision was final. The execution of the judge's decision was the duty of the *Amīr* who was helped by the town notables and a small police force.

The customary tribal law was the third system. This system consisted of unwritten laws which had evolved with the historic development of the tribe. Each tribe had its own judges who render judgments according to precedents. Their judgments were binding over all the members of the tribe.

King 'Abd al-'Aziz did not introduce any intrinsic changes; he simply attempted to make these systems work harmoniously and started a process for their unification. However, he succeeded in integrating the legal system of the country when he promulgated the Constitutional Instructions of the *al-Ḥidjāz* Kingdom on the 26th of August, 1926.

Although the Constitutional Instructions of 1926 have not been formally enacted for *Nadjd* or for the Kingdom of Saudi Arabia as a whole, there is no doubt that the same Instructions apply to the whole country.⁸ These Instructions stated that:

" The legal standards of all regulations shall always be in accordance with the Book of God, *the Sunnah* of the Prophet *Muḥammad* and the conduct of the Companions of the Prophet and the first virtuous generation."⁹

One legal writer deems the Constitutional Instructions of 1926 as an administrative act, governing the administration in the country, rather than a constitutional act clarifying the limits of the powers of the judicial, executive and legislative authorities.¹⁰ However, it seems that these Instructions contained several

⁸ SCHACHT, Joseph., *Islamic Law in Contemporary State*, 1959, vol. 18, The American Journal of Comparative Law, p. 137; also SOLAIM, Soliman A., *Constitutional and Judicial Organisation in Saudi Arabia*, A thesis submitted for the Degree of Ph.D. to Johns Hopkins University, University Microfilms International, Ann Arbor, Michigan, USA, 1978, p. 23.

⁹ The Constitutional Instructions of *al-Ḥidjāz* Kingdom of 1926, Art. 6.

¹⁰ EL-AHDAB, Abdul Hamid., *Commercial Arbitration with the Arab Countries*, London, Graham & Trotman, 1990, p. 580.

provisions which regulate important constitutional aspects, such as the text of the article mentioned above.

The legal system of the Kingdom of Saudi Arabia follows *the Sharī'ah* with special reference to *the Ḥanbalī* school of Islamic jurisprudence as interpreted by *Muḥammad Ibn 'Abd al-Wahhāb*. This school, which is one of the four major schools of Islamic jurisprudence, was founded by *Aḥmad Ibn Ḥanbal* (780-855 A.H.)¹¹ in Baghdad in Iraq.¹² In fact, these schools do not differ in fundamentals but still do disagree in some points of detail.

Even though *the Ḥanbalī* school strictly adheres to the text of *the Qur'ān* and the traditions of the Prophet *Muḥammad*, it is the most liberal of the four major schools with regard to the freedom of persons to enter into contractual transactions. Hence, *the Ḥanbalī* school determines that every condition agreed upon between the parties as part of the contract is valid and must be carried out unless it is inconsistent with *the Sharī'ah*.¹³

The principles of *the Sharī'ah* combine the religious and secular leadership of the country in one person, who is the King (*Imām*) in the Kingdom of Saudi Arabia. Accordingly, the King has the right to issue any necessary administrative legislations for the good administration of the country and for fulfilling the changing society's needs and renewed circumstances. Such legislations are termed "Regulations" and not "Laws" because God is the only legislator in Islam, and the ruler of the country can only issue administrative regulations. In the Kingdom of Saudi Arabia,

¹¹ The abbreviation "A.H." means the Hijri date which is the official calendar in the Kingdom of Saudi Arabia.

¹² The other major schools are; *the Ḥanafī* school founded by *Abū Ḥanīfah al-Nu'mān Ibn Thābit* in *Kūfah*, Iraq, which is prevalent in Egypt, Syria, Lebanon and Turkey; *the Mālikī* school founded by *Mālik Ibn Anas* in *al-Madīnah*, The Kingdom of Saudi Arabia, which is prevalent in Morocco, Algeria, Tunisia, Sudan, Kuwait and Bahrain; and *the Shāfi'ī* school founded by *Muḥammad Ibn Idrīs al-Shāfi'ī* in Egypt, which is prevalent in Syria, Lebanon, Palestine, Jordan, Iraq, Pakistan and Indonesia. *The Ḥanbalī* school is prevalent in the Kingdom of Saudi Arabia, Pakistan, Syria and Iraq. See MAHMASSANI, S., *Falsafat al-Tashri' fī al-Islam (The Philosophy of Jurisprudence in Islam)*, English Translation by Ziadeh, F., Leiden, The Netherlands, E. J. Brill, 1961, pp. 19-39.

¹³ LAYISH, Aharon., *Saudi Arabian Legal Reform as A Mechanism to Moderate Wahhabi Doctrine*, 1987, vol. 107, no. 2, Journal of the American Oriental Society. p. 284.

regulations are issued by the Council of Ministers and sanctioned by the King.¹⁴

Administrative regulations apply and supplement *the Sharīah*. They must always be in conformity with *the Sharīah* which remains the supreme law in the Kingdom of Saudi Arabia. In the case of any contradiction, however, *the Sharīah* prevails over regulations.

In February 1927, King 'Abd al-'Aziz called the 'Ulamā', Islamic scholars, to convene a conference in *Makkah* to clarify their opinions, in respect of the existing Ottoman laws prevailing in *al-Ḥijāz*. The conference issued its decision which stated that:

" If there is any of them (Ottoman laws) in *al-Ḥijāz*, it will be immediately abolished and nothing except the pure *Sharīah* will be applied."¹⁵

However, because the sudden abrogation of the existing Ottoman laws would have caused confusion in the life and transactions of the people and also of the King's wish to ensure legal continuity and contact with the outside world,¹⁶ King 'Abd al-'Aziz decided to retain the Ottoman laws and to gradually abrogate them at a later date. Accordingly, he ordered the attorney general of *al-Ḥijāz* to adhere to the Ottoman laws until such time as they were abrogated or replaced by the King.¹⁷

In an important step to codify and unify the judicial and legal systems, King 'Abd al-'Aziz ratified the Resolution of the Judicial Institution of 1928, which provided that *the Ḥanbalī* school is considered as the basis of the Saudi judicial system. This Resolution designated the following *Ḥanbalī* texts as the authoritative sources of law, in decreasing order:

(a)- *Sharḥ Muntahā al-Irādāt* by *Manṣūr al-Bāhwatī*.

¹⁴ SHAMMA, Samir., *Law and Lawyer in Saudi Arabia*, July 1965, vol. 14, International and Comparative Law Quarterly, p. 1035.

¹⁵ WAHBAH, Ḥāfiẓ., *Djaziyrat al-'Arab fī al-Ḳarn al-'Ashrīn (The Arabian Peninsula in the Twentieth Century)*, Cairo, Egypt, 1935, pp. 319-321.

¹⁶ MUḤAMMAD 'ABD AL-DJAWĀD, Muḥammad., *al-Taṭawwir al-Tashrī'ī fī al-Mamlakah al-'Arabiyyah al-Sa'ūdiyyah (The Legislative Development in the Kingdom of Saudi Arabia)*, Cairo, Egypt, Cairo University Press 1977, pp. 44-55, 67-68.

¹⁷ The Order No. 1166, dated 27/12/1345 A.H.(1927 A.D.).

(b)- *Kashf al-Ḳināʾ* ‘an Matn al-Iḵnāʾ by the same author.

(c)- Commentaries of *al-Zād*.

(d)- Commentaries of *al-Dalīl*.

(e)- If no answer is found then reference may be made to secondary sources in *Ḥanbalī* legal manuals.

(f)- If there is no *Ḥanbalī* work to answer the question, reference may be made to the authorities in the other three main schools (*Ḥanafī*, *Malikī* and *Shafīʿī* schools).¹⁸ As well, *the Ḥanbalī* text is not applied in some religious matters if it is inconsistent with the tradition and custom prevailing in one of the Saudi provinces where, in this case, the reference may be made to the texts of the other main schools followed in this province. Moreover, certain aspects, such as the issues of inheritances were excluded from *the Ḥanbalī* texts by a royal decree.¹⁹

The discovery of Oil in 1938 led to rapid progress in various spheres. This progress required the government, represented by the Council of Ministers and the King, to issue a number of relevant administrative regulations, adjusting the development in all spheres, particularly in respect of commerce and industry. Consequently, the government has promulgated certain regulations such as, the Commercial Court Regulation of 1931, the Nationality Regulation of 1954, the Companies Regulation of 1965, the Labour and Workmen Regulation of 1969, the Arbitration Regulation of 1983 and the Basic Regulation of 1992.

In fact, although the number of administrative regulations has increased in recent years, it can be concluded that the government attempts to achieve an acceptable balance between the traditional Islamic legal concepts, and the needs and requirements of the modern Saudi Arabia.²⁰

¹⁸ AMIN, S. H., *Middle East Legal Systems*, Glasgow, Scotland, Royston Ltd, 1985, pp. 312-13.

¹⁹ The Royal Order No. 5/4//9, dated 26/07/1353 A.H.(1933 A.D.).

²⁰ For discussion of this point, SEAMAN, Bryant W., *Islamic Law and Modern Government: Saudi Arabia Supplements the Shariʾah to regulate development*, 1980, vol. 18, no. 3, Columbia Journal of Transnational Law, pp. 479-81.

1.1.3 Sources of the legal system

The sources of the Saudi legal system are divided into four sources as follows; *the Sharī'ah* (Islamic law), state regulations and resolutions, international treaties, and custom and practice.

1.1.3.1 *The Sharī'ah (Islamic Law)*

The Sharī'ah is the supreme source in the Kingdom of Saudi Arabia. All other sources must not contradict it otherwise they will be considered null and void. *The Sharī'ah* governs most legal issues involving property, criminal conduct, marriage, inheritance and all matters which are not governed by regulations. There are two kinds of *the Sharī'ah* sources:

- The principal sources which are *the Qur'ān*, *the Sunnah* (traditions of the Prophet *Muḥammad*), *the Idjmā'* (consensus) and *the Qiyās* (analogy).
- The supplementary sources such as, *Istiḥsān* (juristic preference).

1.1.3.1[i] The principal sources

1.1.3.1[i][A] *The Qur'ān*

The Qur'ān is the Holy Book of Islam and the primary source of Islamic jurisprudence. All Muslims believe *the Qur'ān* is the very word of God. It regulates moral, spiritual and social life, especially the relationship between God and human beings and also between human beings themselves.

The Qur'ān does not establish a formal system of law providing specific solutions to all legal problems inherent in a society.²¹ However, it contains general principles from which the solutions to these problems are derived.

²¹ Ibid., p. 481.

1.1.3.1[i][B] The Sunnah

The second principal source of the Islamic jurisprudence is *the Sunnah* which literally means "habitual practice". *The Sunnah* is the Prophet's sayings, deeds and tacit approvals of another's action or practice. It explains *the Qur'ān* and interprets its general provisions. Accordingly, when *the Qur'ān* does not expressly set forth a rule for an issue, muslims will resort to *the Sunnah*.

1.1.3.1[i][C] The Idjmā' (consensus of the opinions)

After the death of the Prophet *Muḥammad* and the spread of Islam in various parts of the World, new questions to which neither *the Qur'ān* nor *the Sunnah* stated explicit answers arose. *The Idjmā'*, which literally means "consensus", was then the way to meet the needs of changing times.²²

Consensus is the agreement of Islamic scholars in any special area on a rule for a new question, when the existing rule is unclear or is not covered in the two principal sources (*the Qur'ān* and *the Sunnah*).

Islamic scholars differ in opinion about the meaning of *the Idjmā'*. Some of them stipulate for the validity of *the Idjmā'* that all Islamic scholars in the world agree upon a rule for a new question, whereas other scholars stipulate a general consensus of opinion amongst Islamic scholars of a particular geographical area. Few Islamic scholars assert that binding consensus is limited to agreement of the Companions of the Prophet.²³

²² KARL, David J., *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 1991, vol. 25, no. 1, The George Washington Journal of International Law and Economics. p. 139.

²³ For further details, MAHMASSANI, S., *supra* note (12), pp. 76-78; also KOURIDES, Nicolas., *The Influence of Islamic Law in Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*, 1970, vol. 9, no. 2, Columbia Journal of Transnational Law, p. 391.

1.1.3.1[i][D] The Ḳiyās (analogy)

The Ḳiyās literally means "analogy". Islamic scholars resort to this source when *the Ḳur'ān*, *the Sunnah* and *the Idjmā'* have failed to provide a rule for a new issue. This source allows for the application of the same rule in situations where a given cause or effect is identical to a cause or effect previously covered by the law.²⁴

1.1.3.1[ii] The supplementary sources

There are other less important sources of Islamic law such as, *al-Istiḥsān* (juristic preference) which means the deviation from the rule of a precedent to another rule for a superior legal reason that requires such deviation.²⁵

1.1.3.1[iii] Minimum Standards of the Sharī'ah

It is difficult to say that there are specific minimum standards of *the Sharī'ah* by which it can be decided whether any matter or question is permissive or prohibited according to *the Sharī'ah*. However, there are few texts in *the Ḳur'ān* and *the Sunnah*, the main sources of *the Sharī'ah*,²⁶ which contain express rules dealing with certain matters. For example, usury (interest) is prohibited in *the Sharī'ah* because *the Ḳur'ān* explicitly states that:

“ But Allah (God) hath permitted trade and forbidden usury”²⁷

²⁴ MAHMASSANI, S., *supra* note (12), pp. 80-82; also KOURIDES, Nicolas., *supra* note (23), p. 391.

²⁵ For further details, MAHMASSANI, S., *supra* note (12), p. 83; also AMIN, S. H., *Legal Systems in the Gulf States*, 1983, Lloyd's Maritime and Commercial Law, p. 72.

²⁶ For further details, see above. pp. 15-16.

²⁷ The Holy *Ḳur'ān*., *Sūrat al-Baqarah* 2:275, English translation of the meanings and commentary, revised & edited by Islamic Researches, Iftā', Call and Guidance, The Kingdom of Saudi Arabia, 1990, p. 127.

The Sharīʿah has been sent down for people's interests. So, *the Sharīʿah* scholars have considered that there are five major benefits which must be preserved as follows:²⁸

The Sharīʿah provides for the preservation of religion, life, offspring, mind and material wealth as necessary benefits. *The Sharīʿah* has prohibited innovations (*Bid'ah*) in religious rules for the preservation of religion. It has also preserved life by imposing retaliation (*Qisas*) and blood money (*Diyah*).

Offspring has been preserved by the prohibition of adultery. Drinking wine or any kind of alcohol has been prohibited by *the Sharīʿah* for the preservation of mind.

For the preservation of material wealth, *the Sharīʿah* has encouraged people to gain money by lawful manner, and forbidden theft, deceit and taking others' possessions without reason. As well, *the Sharīʿah* has forbidden usury and gambling based on the belief that obtaining something for nothing is inherently immoral and wrong.²⁹

The prohibition of usury implies that any contract that charges an unusually high interest rate or builds in an excessive profit margin will be void as oppressive and exploitative.³⁰

The matters and questions which have been dealt with by *the Sharīʿah* can be divided into two kinds as follows:

1.1.3.1[iii][A] Substantive matters

The Sharīʿah has expressly prohibited certain substantive matters, such as

²⁸ For details, see AL-ShĀṬIBĪ, Abū Ishāq Ibrāhīm bin Mūsā., *al-Muwāfaqā fī Uṣūl al-Sharīʿah* (*The Analogy in the Principles of the Sharīʿah*), 2nd ed., vol. 2, Beirut, Lebanon, 1975, pp. 8-10; also KHALLĀF, 'Abd al-Wahhāb., *'Ilm Uṣūl al-Fiḥ* (*Principles of the Sharīʿah*), 17th ed., Riyadh, The Kingdom of Saudi Arabia, 1985, pp. 198-201.

²⁹ COULSON, Noel J., *Commercial Law in the Gulf States: The Islamic Legal Tradition*, London, 1984, p. 103.

³⁰ SLOANE, Peter D., *The Status of Islamic Law in the Modern Commercial World*, 1988, vol. 22, International Lawyer, p. 748.

usury, gambling, drinking wine or alcohol, drugs and pig's meat. For example, *the Qurān* contains some verses which explicitly state the prohibition of gambling and drinking wine. It states that:

“ O ye who believe! Intoxicants and gambling, Sacrificing to stone,
And (divination by) arrows, Are an abomination, Of Satan's
handiwork: Eschew such (abomination), That ye may prosper.”³¹

However, there are several substantive matters and questions which have not expressly been dealt with in *the Sharī'ah*. So, *Sharī'ah* scholars have reached different views in respect of these matters. For example, musical instruments where many *Sharī'ah* scholars prohibited them whereas other scholars allowed to listen to music and to use musical instruments.³²

1.1.3.1[iii][B] Procedural matters

The Sharī'ah has required that people must respect some procedural matters, such as judges and arbitrators must respect the principle of equal treatment of the parties to the dispute during the proceedings and also the principle of giving of both parties full opportunity to present their claims and evidence.³³

However, there are some other procedural matters which have not explicitly been dealt with in *the Sharī'ah*. For example, *the Sharī'ah* scholars have differed in respect of the ability of women to act as judges or arbitrators.³⁴

Finally, it can be concluded that there are certain matters and questions which have expressly been prohibited by the texts of *the Sharī'ah*. So, any contract which

³¹ The Holy *Qurān*, *Sūrat al-Mā'idah* 5:90, supra note (27), p. 315.

³² For further details, IBN ḤAZIM, 'Alī A. S., *Al-Muḥallā*, vol. 9, Beirut, Lebanon, Dār al-'Afāḳ al-Jhādīdah, undated, pp. 55-63.

³³ JHĪRAH, 'Abd al-Mun'am A., *Nizām al-Qaḍā' fī al-Mamlakah al-'Arabiyyah al-Sa'ūdiyyah (Judiciary System in the Kingdom of Saudi Arabia)*, Riyadh, Public Administration Institute Press, 1988, pp. 111-20.

³⁴ For further details, see below, pp. 139 *et esq.*

deals with one of these matters will be null and void.

1.1.3.2 State Regulations and Resolutions

The second source of law in the Kingdom of Saudi Arabia is state regulations and resolutions, which are made to deal with the contemporary legal problems arising from the rapid development in various domains.

These regulations should be compatible with *the Sharīah* principles. Consequently, *the Sharīah* principles will prevail over the regulations if there is a conflict between them. The aim of state regulations is not to change *the Sharīah* traditions but to supplement them.

Indeed, the difference between words "legislation" and "regulation" is only in terminology and has no practical significance because the Saudi regulations have all the characteristics of secular legislation and have the same force, authority, weight and sanction as any appropriate legislation would have in any other jurisdictions.³⁵

The official procedure for issuing regulations can be summarised as follows: when there is the necessity for regulation in a special sphere, a particular committee, formed of legal advisors in the concerned ministry, prepares the text of a proper draft regulation. The draft regulation is then submitted to the Division of Experts in the Council of Ministers which reviews and revises it. After that, the Division of Experts submits the draft regulation to the Council of Ministers for consideration.

If the Council ratifies the proposed regulation, it will then refer the draft regulation to the Consultative Council which reviews it. After that, the Consultative Council will send the draft regulation back with its comments and recommendations to the Council of Ministers which will study these comments and submit the draft regulation to the King who approves and issues a Royal Decree which will be published in the official gazette, *‘Um al- Ķurā*.

In addition, all ministers and some heads of government agencies have the authority to make administrative resolutions and bye-laws of regulations by

³⁵ AMIN, S. H., *supra* note (18), p. 313.

ministerial circulars. However, these circulars are not published in the official gazette and they have less value than royal decrees. Accordingly, decrees prevail when there is any contradiction between them and circulars.

The number of regulations has recently increased in the Kingdom of Saudi Arabia, particularly those regarding business and commercial activities. It is highly desirable to give a short summary about the most important regulations. The kinds of those regulations may be grouped as follows:

1.1.3.2[i] Constitutional and Administrative Regulations

The first regulation governing the constitutional aspects in the Kingdom of Saudi Arabia was the Constitutional Instructions of the *al-Ḥijāz* issued in 1926 by King 'Abd al-'Aziz. Indeed, *the Qur'ān* is deemed to be the written constitution. King *Sa'ūd Ibn 'Abd al-'Aziz* stated that *the Qur'ān* is the Saudi Constitution:

" It is our only law on the spiritual way, and also traces our steps in temporal relations. Our law is *the Qur'ān*, the tradition of the Prophet and the Orthodox Caliphs and those who followed them; thus, Islam is our social doctrine".³⁶

On the first of March 1992, King *Fahd* promulgated three significant regulations:³⁷ the first of which enunciates a basic regulation of government, the second regulation creates a new Consultative Council and the third provides for the revision of the regulation of provincial government.

1.1.3.2[i][A] The Basic Regulation

The Basic Regulation is analogous with a constitution although it reaffirms that the true constitution of the Kingdom of Saudi Arabia is *the Qur'ān* and the

³⁶ EL-AHDAB, Abdul Hamid., *supra* note (10), p. 581.

³⁷ The Royal Decrees No. A/ 90, A/91 and A/92, dated 27/08/1412 A.H.(1992 A.D.).

Prophet *Muḥammad's Sunnah*. The Basic Regulation is divided into nine chapters that address the following fundamental subjects: Islam as the state religion, the monarchy and its succession, the branches of government, including independence of the judiciary and equal access to the courts, social welfare, civil rights, defence, external affairs, state finance, and the national economy.³⁸

1.1.3.2[i][B] The Consultative Council Regulation

This Regulation creates a new council which consists of sixty members who are appointed by the King for a four-year term. The King nominates a new council for another four-year term two months before the expiration of the term of the existing council. At least half of the members of the council must be new nominees.

In accordance with the Consultative Council Regulation Provisions, the Council has the power to suggest new regulations and review regulations proposed by the Council of Ministers prior to enactment. Its proposed regulations must be submitted to the Council of Ministers for consideration. If the Council of Ministers approves them, such proposals will also need the approval of the King. Moreover, regulations and bilateral and multilateral treaties will be promulgated and amended by royal decrees only after the Consultative Council has reviewed them.³⁹

Under the Basic Regulation, the King has reserved the right to dissolve the Consultative Council and restructure it.⁴⁰

1.1.3.2[i][C] The Provincial Government Regulation

The aim of this Regulation is to develop and improve the Administrative Provinces. The Kingdom of Saudi Arabia is divided into a number of provinces that

³⁸ KRITZALIS, Alexander S., *Saudi Arabia*, 1992, vol. 26, no. 3, The International Lawyer, p. 830.

³⁹ The Consultative Council Regulation issued by Royal Decree No. A/91, dated 27/08/1412 A.H.(1992 A.D.), Arts. 3, 13, 17, and 18.

⁴⁰ The Basic Regulation issued by Royal Decree No. A/90, dated 27/08/1412 A.H.(1992 A.D.), Art. 68.

are subdivided into governorates, districts and centres.

Each province has a provincial council which is chaired by a governor. These councils consist of the governor of the governorate and the heads of the branches of governmental bodies. The new feature of this regulation is that each provincial council also includes at least ten Saudi citizens residing in the province. The provincial councils have the powers to determine the needs of their provinces, make recommendations for projects and improvements, and discuss the annual budget of their provinces.⁴¹

1.1.3.2[i][D] The Council of Ministers Regulation

In 1993, a new regulation governing the Council of Ministers was promulgated by a Royal Decree.⁴² This regulation revised and abrogated a number of provisions of the prior Regulation of the Council of Ministers. The Council of Ministers is composed of the Prime Minister who presides, the Ministers, the Ministers of State and the King's Counsellors. The King who is at the same time the Prime Minister appoints the Council's members.

The Council of Ministers decides national and foreign state policy. It has regulatory, executive and administrative powers, it has authority over the activities of the different ministries and controls financial affairs. However, the Council does not have final power with respect to the ratification of regulations, entering into bilateral and international treaties, granting concessions and deciding the annual budget and taxes. The final power is in the hands of the King.

⁴¹ The Provincial Government Regulation issued by the Royal Decree No. A/92, dated 27/08/1412 A.H. (1992 A.D.), Arts. 1, 3, 15, 16 and 23.

⁴² The Royal Decree, No. A/13, dated 03/03/1414 A.H. (1993 A.D.).

1.1.3.2[i][E] The Civil Service Regulation

The Civil Service Regulation issued in 1977⁴³ abrogated the Public Official Regulation issued in 1971. This Regulation is composed of forty terms. It regulates all matters regarding employment, job classification, the qualifications required by an employee, and the employees' rights and duties. In addition, the Regulation governs all issues concerning wages, allowances, remunerations, compensations and vacations.

There are a number of implementations which explain and interpret the Civil Service Regulation of 1977, for example, the Implementation of Training and the Implementation of the classification of employees' wages.

1.1.3.2[ii] Commercial Regulations

Many regulations governing the business and commercial field have been made since the establishment of the Kingdom of Saudi Arabia. The following is a short summary of the most important commercial regulations:

1.1.3.2[ii][A] The Commercial Court Regulation

In 1931, King 'Abd al-'Aziz promulgated the Commercial Court Regulation.⁴⁴ This Regulation consists of 631 terms which govern land and maritime commerce, bills of exchange and bankruptcy. It also contains elements of agency, commercial papers and companies rule which have been replaced by separate regulations. The Commercial Court Regulation of 1931 is still in existence today and its provisions are valid unless new regulations have abrogated them.

⁴³ The Royal Decree No. M/49, dated 10/07/1397 A.H.(1977 A.D.).

⁴⁴ The Royal Decree No. 32, dated 15/01/1350 A.H.(1931 A.D.).

1.1.3.2[ii][B] The Investment of Foreign Capital Regulation

The Foreign Capital Investment Regulation was promulgated in 1979⁴⁵ and its Implementation Rules were issued in the same year.⁴⁶ The Regulation governs the licensing of foreign companies wishing to do business in the Kingdom of Saudi Arabia. To invest "Foreign Capital" in the Kingdom, a licence must be obtained from the Foreign Capital Investment Committee of the Ministry of Industry and Electricity.

1.1.3.2[ii][C] The Companies Regulation

The Companies Regulation issued in 1965⁴⁷ is based on Egyptian commercial law which was derived from French commercial law. This Regulation governs contracts between two or more persons who undertake to participate in an enterprise for profit, with each person contributing a share of money or services and agreeing to divide any profits realised or losses incurred.⁴⁸

The forms of doing business authorised by the Companies Regulation of 1965 are as follow:

- 1- Joint Liability Partnership.
- 2- Mixed Liability Partnership.
- 3- Mixed Liability Partnership by Shares.
- 4- Limited Liability Partnership.
- 5- Joint Ventures.
- 6- Joint Stock Company.
- 7- Variable Capital Partnership.
- 8- Co-operative Company.

⁴⁵ The Royal Decree No. M/4, dated 02/02/1399 A.H.(1979 A.D.)

⁴⁶ The Ministerial Resolution No. 323, dated 10/06/1399 A.H.(1979 A.D.).

⁴⁷ The Royal Decree No. M/6, dated 22/03/1385 A.H.(1965 A.D.).

⁴⁸ The Companies Regulation of 1965, Art. 1.

The Companies Regulation of 1965 has been the subject of a number of amending decrees in 1967, 1982 and 1992.⁴⁹

1.1.3.2[ii][D] Other Commercial Regulations

There are a number of other commercial regulations which were promulgated by Royal Decrees. For example, the Commercial Agencies Regulation, the Registration of Trade Marks Regulation, the Bank Control Regulation, the Commercial Register Regulation, the Regulation of Negotiable Instruments, the Exchange Control Regulation and the Commercial Fraud Regulation.

1.1.3.2[iii] Labour and Social Securities Regulations

1.1.3.2[iii][A] The Labour and Workmen Regulation

As a result of the continuous progress in various spheres in the Kingdom of Saudi Arabia and the increasing number of foreign workmen, the Kingdom of Saudi Arabia issued its Labour and Workmen Regulation in 1969.⁵⁰ This Regulation governs labour contracts and the relationships between employers and workers. It deals in detail with the matters concerning employment conditions, wages, safety and health and also its provisions regulate the matters of vacation periods, working hours and overtime. The Labour and Workmen Regulation of 1969 is applied by two committees known as the Primary and the Supreme Committees.

⁴⁹ The Royal Decree No. M/5, dated 12/02/1387 A.H. (1967 A.D.); the Royal Decree No. M/23, dated 28/06/1402 A.H. (1982 A.D.); also the Royal Decree No. M/22, dated 30/07/1412 A.H. (1992 A.D.).

⁵⁰ The Royal Decree No. M/21, dated 06/09/1389 A.H. (1969 A.D.).

1.1.3.2[iii][B] The Social Securities Regulation

This regulation, which was issued in 1969,⁵¹ stipulates compulsory social security for workers, whether Saudi or foreign, in public or private establishments of twenty or more workers with a right to compensation for labour accidents and occupational diseases, and for incapacity, illness and death.

1.1.3.2[iv] Criminal Regulations

In general, the *Sharīah* governs most of the kinds of crimes, such as murder and theft. However, there are some regulations which govern specific crimes. For example, the Bribery Regulation and the Forgery Regulation which were successively promulgated in 1961 and 1962 by Royal Decrees.⁵²

1.1.3.2[v] Tax Regulations

Income tax was introduced in the Kingdom of Saudi Arabia by the Royal Decree issued in 1950 which was amended in 1956 and has been the subject of numerous amending decrees. Income Tax Regulation distinguishes between Saudis and foreigners and for this reason, there are two different systems of tax applied in the Kingdom of Saudi Arabia.

Under this Regulation, Saudis are liable only for a direct tax, known as *Zakāh*, which is rated at only 2.5% whereas foreigners are liable for income tax which is subdivided into company tax and personal income tax. The Administration of *Zakāh* and Income Tax is responsible for tax matters and tax rates.

⁵¹ The Royal Decree No. M/22, dated 06/09/1389 A.H. (1969 A.D.).

⁵² Further details, MAḤMAṢĀNĪ, S., *al-'Awḍā' al-Tashrīyyah fī al-Bilād al-'Arabiyyah (Legislative Positions in the Arab Countries)*, 4th Ed., 1981, pp. 414-15.

1.1.3.2[vi] Other Regulations

There are other regulations which govern other spheres such as, the Residence Regulation of 1951, the Nationality Regulation of 1954, the Regulation for Protection and Encouragement of National Industries of 1961, the Mining Regulation of 1972 and the Arbitration Regulation of 1983.⁵³

1.1.3.3 International Treaties

International treaties are one of the essential sources for the Saudi legal system. An international treaty has the same value as a regulation as if the King had ratified it and a special decree issued for it.⁵⁴

The formal procedures when the Kingdom of Saudi Arabia enters into a treaty are as follows:

When the Kingdom of Saudi Arabia wishes to enter into a special treaty, whether a bilateral or a multilateral treaty, the relevant ministry prepares a proposal and submits it to the Council of Ministers for consideration. The Council of Ministers will then submit it to the Consultative Council which will review it and record its notes. Then, the Consultative Council sends it back to the Council of Ministers which submits it to the King for his approval. The Royal Decree, concerning the treaty, will be published in the official gazette, *‘Um al-Ḳurā*.

1.1.3.4 Custom and Practice

One of the most important sources of the legal system in the Kingdom of Saudi Arabia is custom and practice, particularly modern commercial practice in

⁵³ ASHERMAN, Jeanne., *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 1982, vol. 16, The International Lawyer, p. 326.

⁵⁴ The council of Ministers Regulation issued by the Royal Decree No. A/13, dated 03/03/1414 A.H. (1993 A.D.), Arts. 20 &23.

international trade which has made a significant contribution in the course of the development of the contemporary legal system of the Kingdom of Saudi Arabia.⁵⁵

After the discovery of oil in 1938, the relationships between the Saudi businessmen and Government on one hand and foreign parties on the other, particularly in the commercial sphere have increased. Many foreign companies, especially western companies entered into different types of contracts, such as importation and exportation's contracts, and investment contracts with Saudi companies and Government. Accordingly, much western legal thinking derived from these contracts has gradually affected the Islamic traditions of the Kingdom of Saudi Arabia.⁵⁶

These relationships led to issue many state regulations which deal with modern commercial and financial questions, such as regulations governing commercial agencies, companies, papers, banking transactions and maritime aspects.

⁵⁵ AMIN, S. H., *supra* note (18), p. 313.

⁵⁶ *Ibid.*, p. 314.

1.2 Saudi Judicial System

It is said that the Saudi judicial system is dual because it is composed of a hierarchy of *the Sharīah* Courts and of various other adjudicative organs.⁵⁷ However, it seems this reality of the Saudi judicial system is not dual because it can be divided into three kinds of judiciary; *the Sharīah* Courts, the Board of Grievances (the Administrative Court) and the Specialised Judicial Organs. This can be concluded, principally from the Board of Grievances Regulation of 1982 which explicitly states that the Board of Grievances is considered as an independent judicial commission linked directly to the King.⁵⁸

The multiplicity of the commissions in the judicial system is not desirable because it causes many complicated problems, for instance two or more judicial commissions may in certain cases allege that each one has the jurisdiction to decide the dispute arising between the parties, or they may in some other cases refuse to decide a dispute on the basis that they do not have the jurisdiction to resolve it.

In 1981, the Council of Ministers issued a resolution for the composition of specialised courts for the adjudication of commercial, labour and traffic disputes to conform with the regulation issued by the authorities.⁵⁹ However, this resolution has not been applied so far.

The plan of the Government to restructure the judicial system tends to abrogate the specialised judicial organs and transfer their jurisdictions to the Board of Grievances. For example, the Board of Grievances has jurisdiction over all new cases that would have formerly been heard by the Commission for the Settlement of Commercial Disputes.⁶⁰

⁵⁷ Ibid., p. 319; also, LERRICK, A. & MIAN, Q. J., *Saudi Business and Labour Law*, London, Graham & Trotman, 1982, p. 217.

⁵⁸ The Royal Decree No. M/51, dated 17/07/1402 A.H.(1982 A.D.), Art. 1.

⁵⁹ The Council of Ministers Resolution No. 167, dated 14/09/1401 A.H.(1981 A.D.).

⁶⁰ TURCK, Nancy B., *Dispute Resolution in Saudi Arabia*, Summer 1988, vol. 22, no. 2, The International Lawyer, pp. 419-20.

Indeed, this solution does not fit the nature of the Board of Grievances because the Board has jurisdiction to determine the disputes in which one of the parties is the Government or one of its Agencies. However, the Government has declared that this position was temporary until the application of the Council of Ministers Resolution No. 167 issued in 1981.

1.2.1 Institutions of Judiciary

The institutions of the judiciary can be divided into three divisions as follows:

- *The Sharī'ah Courts.*
- The Board of Grievances (Administrative Court).
- Specialised Judicial Organs.

1.2.1.1 *The Sharī'ah Courts*

The Sharī'ah Courts are governed by the Judicial Regulation issued in 1975, and amended in 1975 and in 1981.⁶¹ This Regulation states that:

" Judges are independent with no authority over them in the exercise of their duties except the rules of *the Sharī'ah* and the valid regulation." ⁶²

According to the Judicial Regulation of 1975, there are six qualifications required for a person who wants to be a judge. Article 37 of the Regulation stipulates the following qualifications:

- a- Person must be a Saudi national.
- b- He must be of good conduct.

⁶¹ The Royal Decree No. M/64, dated 4/7/1395 A.H.(1975 A.D.), amended by the Royal Decree No. M/76, dated 14/10/1395 A.H.(1975 A.D.) and the Royal Decree No. M/4, dated 1/3/1401 A.H. (1981 A.D).

⁶² The Judicial Regulation of 1975, Art. 1.

- c- He has a full legal capacity.
- d- He has a degree from a Saudi *Sharī'ah* College, or its equivalent provided that he passes a special test presented by the Ministry of Justice.
- e- The minimum age is twenty-two years or, in the case of appellate judges, forty years.
- f- He was not sentenced to a penalty in a crime of dishonour or dismissed from a public position following a disciplinary order, even if the disabilities resulting from these matters are later removed.

On the other hand, there are a number of reasons for the removal of judges, such as death, resignation, retirement, and the reaching of seventy years of age.⁶³ Moreover, there are specific regulatory grounds for removal of judges, such as medical reasons preventing performance of judicial duties, the loss of confidence and status required by the judicial office and if a judge got a grade of "below average" in three successive administrative evaluations.⁶⁴

Sharī'ah Courts have general jurisdiction in all matters such as civil, criminal, personal status, real property, inheritance and family relationships, save those excluded by regulations.

The Judicial Regulation of 1975 establishes the following hierarchical system: the Higher Judicial Council, the Appeal Courts, the General Courts and the Summary Courts.

1.2.1.1[i] Summary Courts

These courts are composed of one judge or more but their judgments are made by only one judge. Jurisdiction of these courts was defined by the Minister of Justice Resolution issued in 1976 as follows:

⁶³ Ibid., Art. 85 (a, b and c).

⁶⁴ Ibid. , Arts. 57, 51 and 69; more details LERRICK, A. & MIAN, Q. J., supra note (57). pp. 220-22.

1- The first summary court has jurisdiction over minor offences, crimes of defamation and drinking, but has no power to impose sentences of death or amputation. It has also jurisdiction over tort claims arising from wrongs where the damage does not exceed one-tenth of the prescribed Islamic compensation of *Diyah*, blood money.

2- The second summary court has jurisdiction over civil cases where the amount in dispute does not exceed 8,000 Saudi Riyals except cases regarding real property and marriage-related matters.

3- When there is only one summary court, it has jurisdiction over all the matters within jurisdiction of the first and second summary courts.⁶⁵

1.2.1.1[ii] General Courts

The General Courts have universal jurisdiction over all other civil, criminal and personal status cases. Each court consists of one judge or more. However, all judgments are made by one judge except sentences of death, stoning or amputation which must be rendered by a three-judge panel.

1.2.1.1[iii] Appeal Courts

There are two appellate courts, one sits in Riyadh and hears appeals from the Central, Northern and Eastern Provinces, whereas the other sits in *Makkah* and hears appeals from the Southern and Western Province.

The Chairman of the Court of Appeal is selected on the basis of absolute seniority. Judgments of the lower courts must be appealed within fifteen days of the parties' receipt of notification.

The Courts of Appeal are divided into three departments: those which have the power to review criminal cases, personal status cases and cases which do not fall

⁶⁵ ĀL al-SHAYKH, H. A., *al-Tanzīm al-Qadā'i fī al-Mamlakah al-'Arabiyyah al-Sa'ūdiyyah* (*The Judicial Organisation in the Kingdom of Saudi Arabia*), The 2nd Ed. , Jeddah. The Kingdom of Saudi Arabia, Tuhāmah li al-Nashr, 1983, pp. 55-56.

in the first two categories. Departments are bound by their own prior judgments and by that of other departments.

In addition, the Council of Ministers Resolution No. 167 of 1981 stated that the Appeal Courts establish two departments for reviewing judgments issued from the Commercial, Labour and Traffic Courts. However, these departments have not been established yet because this Resolution has not been applied so far.

Three-judge panels hear ordinary appeals but a panel of five judges is needed to hear appeal against sentences of death, stoning, or amputation. Judgments of the Appeal Courts are final except for sentences of death, stoning, or amputation.

The Appeal Courts have General Committees, composed of all members of the court and have both administrative and judicial functions. In addition, the Appeal Courts have powers either to confirm and finalise the judgments of the lower courts or send them back to the lower courts for retrial or with specific directions. If the original trial judge declines to comply with the order of the Appeal Court and insists on his view and judgment, then the Appeal Court has the authority to vacate the original judgment and refer the case to another judge for retrial.

1.2.1.1[iv] The Supreme Judicial Council

The Supreme Judicial Council is the highest authority in *the Sharī'ah* judicial system. It consists of ten members and a chairman who holds the rank of minister. The Supreme Judicial Council performs administrative, consultative and judicial roles. The council functions in the form of two committees.

1.2.1.1[iv][A] Permanent Committee

The Permanent Committee is composed of five full-time members of the rank of chairman of an appellate court. It has jurisdiction to review all sentences of death, stoning or amputation, to study matters submitted by the King and to express opinions on judicial issues when requested to do so by the Minister of Justice.

The Permanent Committee may authorise the criminal investigation or

prosecution of judges. If a judge is confined on suspicion of a criminal act, the Committee must be notified within twenty-four hours. It has the power to order his release with or without bail, or to order his detention. In the latter case, the Permanent Committee may set the detention period and, if needed, extend it later.⁶⁶

1.2.1.1[iv][B] General Committee

The General Committee consists of the chairman, the Permanent Committee's members and five part-time members. The latter are an appeal court chairman or his deputy, the Deputy of Minister of Justice and the three most senior chairmen of the general courts sitting in *Makkah*, *al-Madīnah*, Riyadh, Jeddah, *al-Dammām* and *Djāyẓān*.

The General Committee has limited judicial roles. It has jurisdiction to deviate from prior precedent and to establish a new precedent. Moreover, it has the authority to state general principles of Islamic law in response to legal questions submitted to it by the Ministry of Justice, it has supervisory powers over the judiciary, it has the authority to organise the lower courts and has disciplinary powers against judges.

Finally, the General Committee may hear appeals from judges who have received grades of "below-average" during routine inspections and whose grades have been confirmed by the Administrative Inspection Committee. The decisions of the General Committee are final.⁶⁷

1.2.1.2 The Board of Grievances (Administrative Court)

The Board of Grievances is one of the two types of courts in a classical Islamic legal system.⁶⁸ It was created by regulation promulgated in 1955⁶⁹ which has

⁶⁶ LERRICK, A & MIAN, Q. J., *supra* note (57), p. 224.

⁶⁷ *Ibid.*, pp. 224-25.

⁶⁸ LONG, David E., *The Board of Grievances in Saudi Arabia*, 1973, vol. XXVII, The Middle East

been supplemented in piecemeal fashion over the years.⁷⁰ In 1982, a comprehensive Royal Decree promulgated and reconstituted the Board of Grievances as an administrative court, similar to *the French Conseil d'Etat*.⁷¹

The Board of Grievances is an independent judicial commission with ties to no governmental authority other than the King.⁷² It consists of the chairman, one or more deputies to the chairman, members trained in *the Sharī'ah* and regulatory law, and technical and administrative attachés. The judicial members are afforded the same rights and guarantees as those given to *the Sharī'ah* judges and are subject to the same duties.⁷³

The seat of the Board of Grievances remains in Riyadh but the Chairman of the Board has the power to establish branches according to need. At the present time, the Board of Grievances has three branches established in Jeddah, *al-Dammām* and *Abhā*. Moreover, there are six panels of the Board of Grievances which have been established to hear cases involving public works contracts disputes. Three of these panels sit in Riyadh; one sits in Jeddah; one sits in *al-Dammām* and one sits in *Abhā*. Each panel is composed of three judges.⁷⁴

The panels must consist of Saudi *Sharī'ah*-trained judges who are assisted by consultants, who are usually non-Saudi Arab legal advisors with experience in administrative law.⁷⁵

There is also the Committee of Administrative Matters for Board Members,

Journal, pp. 71-72.

⁶⁹ The Royal Decree No. 2/13/8759, dated 17/09/1374 A.H. (1955 A.D.).

⁷⁰ The Board of Grievances Resolution No. 3570/1, dated 01/12/1379 A.H. (1959 A.D.) and the Council of Ministers Resolution No. 818, dated 17/05/1396 A.H. (1976 A.D.).

⁷¹ The Royal Decree No. M/51, dated 17/07/1402 A.H. (1982 A. G).

⁷² The Board of Grievances Regulation of 1982, Art. 1.

⁷³ Ibid., Arts. 2 and 16.

⁷⁴ MAHASSNI, H. & GRENIÉY, N. F., *Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court*, 1987, vol. 21, no. 3, The International Lawyer, p. 835.

⁷⁵ TURCK, Nancy B., *supra* note (60), p. 420.

which is composed of the Board Chairman or his Deputy and six members whose ranks are at least Judge (B) Rank chosen by the Board Chairman. This Committee has administrative functions similar to those of the Supreme Judicial Council in *the Shari'ah Courts System*.⁷⁶ The General Commission is composed of all working members of the Board with the Chairman.

The Board of Grievances has general jurisdiction to adjudicate the disputes to which the Government or one of its entities is a party, whether they arise from a government contract, from an administrative ruling or from other administrative acts.

Under the Foreign Capital Investment Regulation of 1979, a foreign investor has the right to appeal to the Board of Grievances in cases where there has been questionable withdrawal of a licence to invest, a denial of the incentives provided by the Regulation, or an order to liquidate the business.

The Board of Grievances has jurisdiction to enforce foreign judgments,⁷⁷ such as the judgments issued by the courts of the Arab League States which they are enforced according to the provisions of the Arab League Convention of 1952 on the Enforcement of Foreign Judgment and Awards because the Kingdom of Saudi Arabia has not ratified the Riyadh Convention on the Judicial Co-operation between the States of the Arab League concluded in 1983 yet.⁷⁸

In 1989, the Branch of the Board of Grievances, sitting in Jeddah, decided to enforce some foreign judgments issued by the commercial court of a State (England) not a party to the Arab League Convention of 1952. However, these decisions were subject to appellate review before the Appellate Review Committee which abrogated them on the basis of there has not been any treaty between the Kingdom of Saudi Arabia and England regarding the enforcement of foreign judgments. For example, the Judgment issued in the Case of F. S. K. R. Co. (Finnish company) v. S. Co. for R.

⁷⁶ The Board of Grievances Regulation of 1982, Arts. 4, 17 and 19.

⁷⁷ The Ministerial Order No. 251 of 1379 A.H. (1959 A.D.).

⁷⁸ TURCK, Nancy B., *Arbitration in Saudi Arabia*, 1990, vol. 6, no. 3, *Arbitration International*, p. 290; also SĀMĪ, F. M., *al-Taḥkīm al-Tidjārī al-Dawli (International Commercial Arbitration)*, 2nd Ed., Amman, Jordan, 1992, p. 82.

& D. (Saudi company) is one of these judgments.⁷⁹ Accordingly, a trial *de novo* would be required with Saudi Law as the applicable law.⁸⁰

Moreover, the Board has jurisdiction to hear disciplinary cases brought by the Supervision and Investigation Committee against public officials and specified regulatory criminal offenders prosecuted by that body. Bribery and forgery crimes are investigated by the Committee and tried before the Board.⁸¹

Finally, the Board of Grievances has jurisdiction over all cases that would have formerly been brought before the Commission for the Settlement of Commercial Disputes (CSCD) from the 31st of December 1987. Accordingly, all issues that were within the jurisdiction of the CSCD, such as distributorship and service agency disputes, all non banking commercial matters involving private litigants, and all disputes involving the Companies Regulation will continue to be adjudicated by the Board of Grievances.⁸²

The Board of Grievances judgments are made by majority vote and reviewed before being finalised by the Board's Chairman or his Deputy who ratifies the judgment or refers it to the Appellate Review Committee for further consideration. The Appellate Review Committee then ratifies or modifies the judgment or submits it to the original committee for further consideration before a final judgment is made. The appeal of final judgments is made to the King who either refers a case to the Board for retrial or refuses the appeal.

1.2.1.3 The Specialised Judicial Organs

There are a large number of specialised judicial organs in the Kingdom of

⁷⁹ The Judgment of the Board of Grievances No. 438/T/3, issued in the Case No. 186/2/K, dated 09/11/1410 A.H. (1990 A.D.).

⁸⁰ KRITZALIS, Alexander S., *supra* note (38), p. 823.

⁸¹ LERRICK, A. & MIAN, Q. J., *supra* note (57), pp. 259-61.

⁸² TURCK, Nancy B., *supra* note (60), pp. 419-20; also SIMPSON, Paul M., *Saudi Arabia: Reorganisation of judicial system*, August 1987, *International Financial Law Review*, pp. 45-46.

Saudi Arabia. It is rare that any State regulation is issued without a provision either establishing a secular commission to have jurisdiction over disputes arising under the regulation, or establishing the competence of an existing secular commission to adjudicate disputes arising thereunder. Each commission has limited jurisdiction according to the provisions of the regulation governing it. This sub-section will discuss the most important specialised judicial organs as follows:

1.2.1.3[i] The Commission for the Settlement of Commercial Disputes (CSCD)

The Commission for the Settlement of Commercial Disputes is the most important judicial commission for private commercial litigation in the Kingdom of Saudi Arabia. It was established in Jeddah in 1926, in the name of the Commercial Court, to settle disputes arising between merchants.

In 1955, the Court was abolished and there was a move to constitute two or more Commercial Courts. In 1962, the Minister of Commerce and Industry issued an order creating two committees where the Primary Committee holds sessions in Riyadh, Jeddah, and *al-Dammām*, and the Appellate Committee sits in Riyadh.

In 1965, the Minister of Commerce and Industry was impelled to constitute the Commission for the Resolution of Commercial Disputes⁸³ which was integrated with the Commission for the Settlement of Companies Disputes in 1967 to form the Commission for the Settlement of Commercial Disputes.

The Commission for the Settlement of Commercial Disputes has three branches which sit in Riyadh, Jeddah and *al-Dammām*. Each is composed of three members, of whom two are trained in *the Sharī'ah* and appointed by the Minister of Justice, and the third is a legal advisor trained in regulations and appointed by the Minister of Commerce.

This Commission has general commercial jurisdiction and applies the provisions of the Commercial Court Regulation of 1931. It has jurisdiction to settle

⁸³ The Minister of Commerce and Industry Order No. 262, dated 1384 A.H. (1965 A.D.).

disputes arising between merchants, shippers, brokers, moneychangers and also all non banking commercial disputes. It also resolves disputes arising from the application of the Companies Regulation, the Service Agency Regulation, and the Trademarks Regulation, and imposes the penalties prescribed therein.

However, the Commission has no jurisdiction neither over criminal cases in the commercial context, which are handled by the Public Prosecutor, nor, as a rule, over disputes concerning real property.⁸⁴

In December 1987, a very important Royal Decree was issued and moved all jurisdictions of the Commission for the Settlement of Commercial Disputes to the Board of Grievances. Accordingly, all cases arising since that date are submitted to the Board of Grievances. The Commission for the Settlement of Commercial Disputes has jurisdiction to decide all cases arising before that date.⁸⁵

The parties must firstly bring their case to the regional governor who then submits it to the Commission for the Settlement of Commercial Disputes.⁸⁶

Decisions of the Commission are final and enforceable if the non-prevailing party has accepted the judgment in writing or if the period of appeal has elapsed. The methods of appeal are various through the regional governor, the Minister of Commerce, and the King , or directly to the Commission itself.

In 1970, decisions of the Commission became final and enforceable with the prohibition on the parties to appeal these decisions and on non-prevailing parties to bring the same case to *the Sharī'ah* Courts.⁸⁷ This step is incompatible with the right of litigants to appeal decisions before a supreme commission or at least before the Minister of Commerce, especially that there were certain cases which involved large amounts.

⁸⁴ LERRICK, A. & MIAN, Q. J., *supra* note (57), p. 241.

⁸⁵ See above., p. 30.

⁸⁶ The Commercial Court Regulation of 1931, Art. 459.

⁸⁷ The High Order No. 1018, dated 18/10/1390 A.H. (1970 A.D.).

1.2.1.3[ii] The Commercial Papers Committee (CPC)

The Commercial Papers Committee was established in 1968 as a committee within the Ministry of Commerce.⁸⁸ This Committee has jurisdiction over claims involving bills of exchange, cheques, and promissory notes.

It has five branches sitting in Riyadh, Jeddah, *al-Dammān*, *al-Ḳaṣīm* and *al-ʿAḥsāʾ*. Each branch consists of a three-member panel, of whom a chairman is trained in *the Sharīʿah* and nominated by the Ministry of Justice, and two are legal experts nominated by the Ministry of Commerce. In 1986, the case load in both Riyadh and Jeddah was so heavy that a single judge, and not a three-member panel, was assigned to each case in these cities.⁸⁹

The parties may directly bring their case to the Committee, or cases may also be referred by the Civil Rights Directorate of the Police. The non-prevailing party can appeal a Commercial Paper Committee judgment within fifteen days of notice of its issue. Appeal is brought to the Legal Committee (LC) in the Ministry of Commerce which can confirm, amend or quash the judgment.

According to the Minister of Commerce Resolution No. 487 issued in 1991, a number of protest offices were established in some of the Saudi Chambers of Commerce and Industry, such as Riyadh Chamber of Commerce and Industry, Jeddah Chamber of Commerce and Industry, *al-Dammān* Chamber of Commerce and Industry, and *al-Madīnah* Chamber of Commerce and Industry. A legal advisor from the Legal Division in each Chamber of Commerce and Industry usually deals with the disputes regarding the Commercial Papers where he firstly attempts to resolve them amicably or he will refer these disputes to the Commercial Papers Committee if he is unable to reach a satisfactory settlement.⁹⁰

⁸⁸ The Ministry of Commerce and Industry Resolution No. 354, dated 05/11/1388 A.H. (1968 A.D.).

⁸⁹ TURCK, Nancy B., *supra* note (60), p. 422.

⁹⁰ The Minister of Commerce Resolution No. 487, dated 19/06/1411 A.H. (1991 A.D.).

1.2.1.3[iii] The Committee for the Settlement of Banking Disputes (CSBD)

In late 1985, a Resolution by the Minister of Commerce stated that disputes arising between banks and their customers out of banking contracts and transactions would be referred to the Legal Committee in the Ministry,⁹¹ which is composed of three legal advisors employed or seconded to the Ministry of Commerce, rather than the Commission for the Settlement of Commercial Disputes or the Commercial Paper Committee.

Some legal writers questioned the legality of this resolution because the Commission for the Settlement of Commercial Disputes and the Commercial Paper Committee had been established by resolutions of the Council of Ministers and their jurisdiction could not be superseded by a ministerial resolution.

Pursuant to the Council of Ministers Resolution No 729/8,⁹² a three-member conciliation committee was established within the Saudi Arabian Monetary Agency (hereinafter referred to as SAMA), the Central Bank, to study cases between banks and their customers unrelated to commercial paper. At the same time, the Commission for the Settlement of Commercial Disputes and *the Sharī'ah* Courts were ordered to suspend hearings of all banking disputes and refer them to the Office of the Presidency of the Council of Ministers for transfer them to the SAMA Committee.

The SAMA Committee can recommend freezing of bank accounts, the attachment of assets and restrictions on foreign travel of litigants. It can also request a government agency to cease dealing with a special customer involved in dispute.

In fact, the Resolution does not clarify whether the Committee for the Settlement of Banking Dispute is able to issue final adjudications or only make recommendations, not binding on the parties because this Committee must submit the dispute to the Court with jurisdiction for decision of the case, that is to one of the

⁹¹ The Minister of Commerce Resolution No. 822, dated 13/04/1406 A.H. (1985 A.D).

⁹² The Council of Ministers Resolution No. 729/8, dated 07/10/1407 A.H. (1987 A.D).

Sharī'ah Courts or the Board of Grievances, if it fails to arrive at a settlement.

In practice, the Committee for the Settlement of Banking Disputes firstly attempts to resolve a dispute by the conciliation. But, if it fails to reach a satisfactory conciliation between the parties to the dispute, it will issue a final and binding decision on the case.

1.2.1.3[iv] Customs Committees (CC)

The Customs Regulation issued in 1953⁹³ creates the Customs Committees to deal with cases involving smuggling or attempted smuggling.

Each Primary Committee consists of four customs officials and one legal advisor. Decisions of these Committees are made by a majority vote and they are subject to appeal within fifteen days of the party's receipt of notification of the decision. Otherwise, the decision becomes final and enforceable. The right to appeal is limited to the defendant and the General Director of Customs.

There are two Appeal Customs Committees sitting in Riyadh and Jeddah. They are composed of three members and decide on all appeals submitted from the Primary Customs Committees within their territorial jurisdiction. All decisions are made by a majority vote and they must be approved by the Minister of Finance and National Economy.

1.2.1.3[v] The Committees for the Settlement of Labour Disputes (CSLD)

The Labour and Workmen Regulation of 1969 creates two levels of committees for the settlement of labour disputes as follows:

- 1- The Primary Committees.
- 2- The Supreme Committee.

The Primary Committees sit in Riyadh, Jeddah, and *al-Dammām*. Each is

⁹³ The Royal Decree No. 425, dated 05/03/1372 A.H. (1953 A.D.).

composed of a three-member panel. The chairman of each Primary Committee must hold a degree in *the Shari'ah* and at least one of the other two members of the committee must hold a degree in *the Shari'ah* or law.

The Primary Committees have final jurisdiction over:

- a- Disputes where the amount involved does not exceed 3,000 Saudi Riyals.
- b- Stays of execution of unlawful termination.
- c- Disputes regarding fines or requests for exemptions from fines.

Additionally, the Primary Committees have jurisdiction, in the first instance over all other labour disputes.

The Supreme Committee, sitting in Riyadh, is a five-member panel which is composed of three representatives of the Ministry of Labour and Social Affairs, one from the Ministry of Commerce, and one from the Ministry of Petroleum and Mineral Resources.

When a labour dispute arises, it will be brought to the Labour Office at the place where the employee is working. If the Labour Office fails to prepare an amicable settlement between the parties, it will then submit the case to the Primary Committee existing in its territory.

Decision of the Primary Committee which does not have final authority can be appealed within thirty days of the party's receipt of the notification of the decision before the Supreme Committee, which can vacate the decision in whole or in part. Judgments of the Supreme Committee are final and enforceable.

1.2.1.3[vi] Other Specialised Judicial Organs

There are also numerous specialised judicial organs which have limited jurisdiction pursuant to their regulations. For example, the Commercial Agency Commission, the Commission for Combating Commercial Fraud, the Commission for Combating Narcotics and the Commission for the Impeachment of Ministers.

Chapter two

Development and types of arbitration in the Kingdom of Saudi Arabia

After clarifying the legal and judicial systems in the Kingdom of Saudi Arabia in chapter one, chapter two will deal with the development and types of arbitration in the Kingdom of Saudi Arabia. It will be divided into two sections. The first section will be devoted to discussing the periods of the development of arbitration in the Kingdom of Saudi Arabia. The second section will focus on the types of arbitration which are *ad hoc* and institutional arbitrations, and domestic and international arbitrations.

2.1 Development of arbitration in the Kingdom of Saudi Arabia

2.1.1 Introduction

Arbitration is now one of the most important methods to which the parties have recourse to resolve their disputes, particularly the disputes arising from international trade transactions.

The concept of arbitration was one of the oldest rudimentary methods of settling disputes in the primitive communities. After the appearance of the concept of the state and the establishment of courts which have become the natural means of resolving disputes, the importance of arbitration as a means of settling disputes was reduced. However, this importance has increased because of the expansion of international trade and the rapid development in the modern communications in the World.

In general, arbitration is an institution of private law because the parties to the dispute entrust to ordinary persons to determine their dispute instead of the competent judicial court. As well, the parties to the dispute have the right to choose the members of the arbitral tribunal, the procedural and substantive laws governing arbitration, the place of arbitration and so on.¹

2.1.1.1 Reasons for resorting to arbitration

The business community today uses arbitration for a variety of reasons. Some of these reasons can be summarised as follows:²

(1)- Arbitration offers the parties the opportunity to choose their own arbitrators who may be more technically competent to settle a complicated contractual dispute than the judges in the court.

(2)- Arbitration is resorted to in order to resolve disputes that do not fall within the jurisdiction of courts, particularly when the parties wish to revise and amend their long-term contract or to fill gaps left by them.

(3)- Arbitration also offers the parties, who do not want details of their disputes to be disclosed in open court, the opportunity to settle their disputes in secrecy.

(4)- Arbitration saves the parties both time and money. It improves the administration of justice because arbitration reduces the procedural formalism and delay.

(5)- Arbitration is viewed as a means of continuing the contractual and commercial relationships between the parties in future.

¹ FAHMĪ, Aḥmad M., *Dirāsah Mūljazah lil Taḥkīm al-Tidjārī al-Dawli* (Brief Study for International Commercial Arbitration), Riyadh, The Kingdom of Saudi Arabia, Undated, p. 11.

² For further details see, DAVID, René., *Arbitration in International Trade*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1985, pp. 10-27; SAYEN, G., *Arbitration, Conciliation, and the Islamic Tradition in Saudi Arabia*, 1987, vol. 19, no. 2, University of Pennsylvania Journal of International Business Law, p. 224; TURCK, Nancy B., *Dispute Resolution in Saudi Arabia*, Summer 1988, vol. 22, no. 2, The International Lawyer, p. 434; and also REDFERN, Alan & HUNTER, Martin., *Law and Practice of International Commercial Arbitration*, 2nd Ed., London, Sweet & Maxwell, 1991, pp. 23-24.

On the other hand, the main defect in the arbitral process is that the arbitral tribunal has limited powers. For example, the arbitral tribunal does not have the power to coerce witnesses who refuse to attend before it. Moreover, it does not have the power to enforce the arbitral award by itself but the assistance of the court of the state where the award will be enforced is necessary.

2.1.1.2 Nature of Arbitration³

Determination of the nature of arbitration will assist to know the method in which the applicable rules of the arbitral process are determined and their scope delimited.⁴ As well, the attitude of national courts to the arbitral process will depend on the nature of arbitration and its relationship with national legal systems.⁵

The nature of arbitration has been the subject of long argument and discussion amongst legal writers. It will be desirable to consider the various theories of arbitration which include the contractual, the jurisdictional, the mixed or hybrid, and the autonomous theories. This is done in summary form.

2.1.1.2[i] The Contractual Theory

This theory emphasises the contractual nature of arbitration. The origin and continuity of arbitration depend on the mutual consent of the parties which is reflected in their agreement to submit disputes to arbitration. In this agreement, the parties determine the kind of arbitration, whether ad hoc or institutional, select the

³ For further details, LEW, Julian D. M., *Applicable Law in International Commercial Arbitration; A Study in Commercial Arbitration Awards*, New York, Oceana Publications, INC, 1978, pp. 51 *et seq*; CHUKWUMERIJE, Okezie., *Choice of Law in International Commercial Arbitration*, Westport, Connecticut & London, Quorum Books, 1994, pp. 9 *et seq*; FOUCHARD, Philippe, GAILLARD, Emmanuel & GOLDMAN, Berthold., *Traité de l'Arbitrage Commercial International*, Paris, Litec, 1996, pp. 11 *et seq*; also DAVID, René., *supra* note (2), pp. 76 *et seq*.

⁴ DAVID, René, *supra* note (2), p. 77.

⁵ WILNER, I., *Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study*, 1965, vol. 19, Rutgers Law Review, p. 650.

persons who act as arbitrators, choose the place and language of arbitration, and determine the time limits of arbitration and the procedures governing the arbitral process.⁶

Arbitration is wholly voluntary in character where the contract containing an arbitration clause is a voluntary agreement between the parties. The law does not impose on the parties to conclude this contract, nor does it give one party power to impose it on another.⁷

According to this theory, arbitration is wholly a product of the agreement of the parties. The theory argues against the influence and intervention of the State in the arbitral process. It also considers the arbitrator as an agent of the parties and his award then becomes binding on them as the principals.⁸

The arbitral award takes its existence from a valid arbitration agreement concluded by the parties. It is voluntarily enforced by the parties or otherwise it can be executed by the courts not as recognising and enforcing the judgment of another court, but as an unexecuted contract.⁹

However, the theory does accept the fact that national law and courts can influence the arbitration proceedings and the award where courts will not enforce an arbitration agreement concerning a subject-matter reserved by the *lex fori* for their exclusive jurisdiction and they will also not enforce an award which is contrary to their public policy or where the arbitral tribunal failed to respect the fundamental notions of natural justice, such as giving both parties equal opportunity to present their case.¹⁰

⁶ LEW, Julian D. M., *supra* note (3) see note no. (69.1), p. 63.

⁷ KELLOR, F., *Arbitration in Action*, New York, Harper and Brothers, 1941, p. 8.

⁸ CHUKWUMERIJE, Okezie., *supra* note (3), p. 10.

⁹ LEW, Julian D. M., *supra* note (3) see note no (71.4), p. 64.

¹⁰ *Ibid.*, p. 56.

2.1.1.2[ii] The Jurisdictional Theory

This theory focuses on the power and authority of the State to control and regulate all arbitrations which are held within its territory. It maintains that the validity of the arbitration agreement, the power of arbitrators and enforcement of the arbitral award all derive from particular national laws. Therefore, arbitration can not be carried on without the rules of the applicable laws which give arbitrators power to hear and decide the dispute, and which enforce the award issued by the arbitrators.

The intentions of the parties mentioned in their arbitration agreement can only be binding to the extent they are recognised by the law of place of arbitration. Moreover, arbitrators have no powers to act without delegated authority by the law of State in which they propose to act. In the absence of this delegated authority, the award will be invalid and without any legal effect.¹¹

If the arbitral award is not voluntarily enforced by the parties the winning party will apply to the competent court for making an enforcement order in the same manner as a court judgment is enforced. Thus, one legal writer considered that in reality an arbitral award is still only a draft judgment, and it becomes a final judgment when the competent authority has adopted it by making *an exequatur*.¹²

This theory is useful because it emphasises the importance of national laws in the conduct of arbitration. However, it does not give sufficient regard to the role of the parties' agreement which is important to the existence of arbitration.¹³

2.1.1.2[iii] The Mixed or Hybrid Theory

The contractual and jurisdictional theories of arbitration are both essentially a one-dimensional evaluation of the nature of arbitration.¹⁴ The mixed or hybrid theory

¹¹ Ibid., p. 52.

¹² Ibid., see reference mentioned in note (67.2), p. 63.

¹³ CHUKWUMERIJE, Okezie., *supra* note (3), p. 12.

¹⁴ Ibid., p. 12.

recognises the dual nature of arbitration where although arbitration derives its effectiveness from the agreement of the parties reflected in the arbitration agreement, it has a jurisdictional nature involving the application of the rules of procedure mentioned in legal system.¹⁵

Arbitration begins as a private agreement between the parties. It carries on according to particular procedure determined by the parties. It ends with an award which has binding legal force and effect, and which the competent court will be prepared to recognise and enforce.¹⁶

This theory gives a fuller picture to the nature of arbitration. It clearly considers an arbitration agreement as a contract between the parties. The arbitration proceedings, however, must be regulated by some national law.¹⁷

2.1.1.2[iv] The Autonomous Theory

According to this theory, arbitration can not be classified as purely contractual or jurisdictional, but has an autonomous character.

The autonomous theory of arbitration looks at the aims and objectives of arbitration rather than to its structure. A complete picture of arbitration can only be presented by looking to its use and purpose, and the way in which it answers the needs of businessmen. Thus, the main advantage of arbitration is not the enforceability of the award, but rather the speed and flexibility of the proceedings.¹⁸

Both arbitration agreements and awards are enforceable not as contracts nor as a concession on the part of enforcing sovereign State, but rather as an important requirement for the smooth functioning of commercial relations.¹⁹

¹⁵ SAUSER-HALL, G., *L'Arbitrage en Droit International Privé*, 1952, 44-I, Ann. Ins. Dr. Int'l, p. 469 mentioned in LEW, Julian D. M., supra note (3), p. 57.

¹⁶ REDFERN, Alan & HUNTER, Martin., supra note (2), p. 8.

¹⁷ LEW, Julian D. M., supra note (3), p. 58.

¹⁸ Ibid., p. 59.

¹⁹ Ibid., p. 60.

Finally, an understanding of the aims and purpose of arbitration is useful in appreciating the nature of arbitration. However, this theory is inadequate in understanding the need for some rules of national law to regulate arbitration. Without these rules, how can the integrity of the arbitral process be ensured? And how can it be guaranteed that arbitrators respect the explicit intentions of the parties?²⁰

2.1.1.2[v] The position in the Kingdom of Saudi Arabia

Arbitration has a jurisdictional nature than a contractual one in the Kingdom of Saudi Arabia because although the arbitration is a product of the parties' agreement to submit their disputes to it the Saudi laws, the Arbitration Regulation of 1983 and its

Implementation Rules of 1985, have control over the way in which the arbitration agreement and award will be enforced. The Saudi laws also give the local courts significant powers in the conduct of the arbitral process. Thus, arbitration agreements must be approved by the Saudi courts before the commencement of the arbitration proceedings, the procedure rules of the Arbitration Regulation of 1983 should be respected, and courts issue enforcement orders of arbitral awards.

It is not surprising that the Saudi law given its history, exercises strong control and supervision over arbitration. The reasons for this control will be set forth when the periods of development of arbitration in the Kingdom of Saudi Arabia are explained in the next sub-section.

2.1.2 Development of arbitration in the Kingdom of Saudi Arabia

The Shari'ah, which is the supreme law in the Kingdom of Saudi Arabia,

²⁰ CHUKWUMERIJE, Okezie., supra note (3), p. 14.

recognises the concept of arbitration as a method of settling the disputes but places some significant limitations on it, such as arbitrators must be Muslims.

The Ḳur'ān contains a number of verses which adopt arbitration. For example, the verse of *Sūrat al-Nisā'* which expressly provides for arbitration in matrimonial disputes:

" If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers. If they seek to set things aright, *Allāh* (God) will cause their conciliation: For *Allāh* hath full knowledge, and is acquainted with all things."²¹

In addition, the Prophet *Muḥammad* and his Companions had recourse to arbitration as a means of resolving disputes. For example, the arbitration between the early Muslims, led by the Prophet *Muḥammad* on the one hand and a Jewish tribe on the other hand in *al-Madīnah*.²²

Arbitration was also practised as an useful method to settle the dispute regarding the supreme sovereignty of the Caliphate itself between 'Ali Ibn 'Abī-Ṭālib, the fourth Caliph, and *Mu'āwiyah Ibn 'Abī-Sufyān*. The result of the arbitration was the loss of 'Ali and the instatement of *Mu'āwiyah* as the fifth Caliph of all Muslims.²³

Sharī'ah scholars have reached different opinions in respect of the concept of arbitration. Certain of them think that arbitration is a form of conciliation and close to settlement where the arbitral award is not binding on the parties to the dispute unless those parties accept this award after its issue by the arbitrators.

However, many *Sharī'ah* scholars think arbitration is close to the concept of litigation as the arbitral award is binding on the parties to the dispute whether or not they accept it.²⁴

²¹ The Holy *Ḳur'ān*. , *Sūrat al-Nisā'* 4:35, English translation of the meanings and commentary, revised & edited by Islamic Researches, Iftā', Call and Guidance, The Kingdom of Saudi Arabia, 1990, p. 220.

²² For details see, note (83) mentioned in SAYEN, G., *supra* note (2), p. 228.

²³ For details see, *Ibid.*, p. 229; also NADER, M. J., *Conciliation and Arbitration in Saudi Arabia under the Chambers of Commerce and Industry*, Jeddah, The Kingdom of Saudi Arabia, Sahar Printing Press, Undated, p. 1.

²⁴ For further details see, EL-AHDAB, Abdul Hamid., *Commercial Arbitration with the Arab Countries*, London, Graham & Trotman, 1990, pp. 18 *et seq*; SALEH, Samir., *Commercial*

Arbitration as a means of settling disputes had been accepted by King ‘*Abd al-‘Aziz* before the promulgation of the establishment of the Kingdom of Saudi Arabia in 1932. He entered into some bilateral treaties which contained clauses submitting any dispute arising out of the performance of these treaties to conciliation and arbitration, such as the Treaty for the Determination of the Boundaries between *Nadjd* Sultanate and the Government of the East of Jordan concluded on the 2nd of November 1925 and also *Makkah* Treaty for the Friendship and Good Vicinity Neighbourhood concluded between *al-Ḥijāz* Kingdom and *Nadjd* Sultanate and its attachments on the one side, and the Kingdom of Iraq on the other side on the 7th of April 1931.²⁵

Moreover, after the establishment of the Kingdom of Saudi Arabia in 1932, the Kingdom of Saudi Arabia has not changed its policy in respect of the inclusion of provisions referring any dispute arising from the execution of the bilateral treaties concluded between it and other countries to conciliation and arbitration, such as *al-Ṭā’if* Treaty between the Kingdom of Saudi Arabia and Yemen concluded on the 20th of May 1934 and Baghdad Treaty between the Kingdom of Saudi Arabia and Iraq on the 2nd of February 1936.²⁶

In fact, the Saudi judicial institutions resented the introduction of any system which might lead to minimising their own jurisdiction. Accordingly, the influence of arbitration as a means of resolving the disputes was absent in practical reality.

In recent years, however, the position of the judicial institutions has changed because of the rapid progress of business and commercial sphere and also the

Arbitration in the Arab Middle East, London, Graham & Trotman, 1984, pp. 20 *et esq*; also AMIN, Sayad H., *Commercial Arbitration in Islamic and Iranian Law*, Tehran, Iran. Vahid Publications, 1988, pp. 33 *et esq*.

²⁵ MUḤAMMED, Aḥmad A., *Mabd’ Taswiyah al-Munāẓ’ā al-Dawliyyah bil Ṭuruḳ al-Silmiyyah fī al-Mu’āḥadā al-Dawliyyah lil Mamlakah al-‘Arabiyyah al-Sa‘ūdiyyah (The Principle for the Settlement of International Disputes by the Amicable Means in the International Treaties of the Kingdom of Saudi Arabia)*, 1991, no. 5, Saudi Studies, p. 74; also AL-RASHIYDĪ, Aḥmad H., *al-Taḥkīm al-Dawī fī al-Khibrah al-‘Arabiyyah al-Mu‘āṣirah (International Arbitration in the Contemporaneous Arabic Experience)*, June 1990, Arabic Affairs, pp. 117-118.

²⁶ MUḤAMMAD, Aḥmad A., *supra* note (25). p. 73; also AL-RASHIYDĪ, Aḥmad H., *supra* note (25), p. 118.

existence of a special arbitration regulation governing the arbitral process.

The development of arbitration in the Kingdom of Saudi Arabia can be divided into two categories:

- Development of arbitration regarding private parties.
- Development of arbitration regarding the State or one of its agencies.

2.1.2.1 Development of arbitration regarding private parties

Before the issue of the Arbitration Regulation 1983, there was no specific regulation which governed matters concerning the arbitral process. There are a few regulations containing some provisions which regulate certain issues of arbitration, for example, the Commercial Court Regulation of 1931, the Labour and Workmen Regulation of 1969 and the Chambers of Commerce and Industry Regulation of 1980. Accordingly, arbitration between private parties has been sporadic.

In addition, the enforcement of arbitral awards issued in *ad hoc* arbitration before 1983 was left to the parties themselves, and the courts had the power to grant or refuse the enforcement of these awards.

One legal writer considers that the resorting of courts to experts for their views with respect to technical matters is deemed a type of arbitration.²⁷ However, the judges in the courts are not bound to comply with the experts' opinion whereas the decisions of arbitrators are binding.

This part may be subdivided on the basis of arbitration rules which are mentioned in some regulations into four points as follows:

2.1.2.1[i] The Commercial Court Regulation of 1931

The first modern rules governing commercial arbitration proceedings in the Kingdom of Saudi Arabia were the rules existing in the Commercial Court

²⁷ HEJAILAN, Salah., *National Reports; Saudi Arabia*, 1979, vol. IV, The Yearbook of Commercial Arbitration, p. 163

Regulation issued in 1931. These rules were abrogated by the Royal Decree No. M/46 promulgated in 1983.

The Commercial Court Regulation of 1931 contained a few rules which govern the arbitral process between private parties. These rules granted the Commercial Court powers to supervise the enforcement of arbitration agreements and awards. However, the State following the advice of its Islamic scholars, who wished to unify the legal system in the framework of *the Sharī'ah* Courts suppressed the Commercial Court. This position did not lead to the abrogation of the Commercial Court Regulation of 1931 which remained in force and the rules relating to arbitration continued to have theoretical existence.²⁸

The Commercial Companies Regulation issued in 1965 contains provisions regarding the establishment of the Commission for the Settlement of Commercial Disputes which ignored the arbitration rules existing in the Commercial Court Regulation of 1931. Consequently, arbitration became optional and the enforcement of arbitral awards depended on the wish of the parties to the dispute. Courts would not enforce either the arbitration agreement or the arbitral award.

Articles 493 to 497 in the Commercial Court Regulation of 1931 deal with some aspects of arbitration. These Articles governed the form and contents of the arbitration agreement, the appointment of arbitrators, time limits, some aspects of the arbitration proceedings, such as the testimony of witnesses, the possibility of challenging the arbitral award before the Court and the need for the approval of arbitral awards by the Court before their enforcement. It is provided that an arbitrator, whose nomination had been confirmed by the Court, could not be dismissed by the parties.

Such Articles also required that the parties to the dispute respect some formal rules, such as arbitration agreements must be certified by a notary public before their execution. It followed therefrom that :

- 1- Arbitration clauses in contracts signed before the dispute arose are invalid.

²⁸ HUSHAN, Mohammed., *The Arab Gulf Countries*, A paper presented to the Euro-Arab Arbitration Conference held in Port EL Kantaoui, Tunisia, 24-27 September 1985, London, Published by Lloyd's of London Press Ltd, 1987, pp. 22-23.

2- Any violation of the formal rules may cause the invalidity of an arbitration agreement.²⁹

2.1.2.1[ii] The Labour and Workmen Regulation of 1969

The Labour and Workmen Regulation issued in 1969 allows employers and employees to submit their disputes to arbitration instead of to the Primary Committee for the Settlement of Labour Disputes. The parties may nominate a sole arbitrator, or one or several arbitrators for each of them in order to resolve their dispute. If the parties disagree upon the appointment of the umpire, the President of the Primary Committee of the place of work will appoint him. In fact, it would be better if the arbitration agreement includes time limits and sets out certain procedures, such as the date of the first session.

The parties can appeal the arbitral award unless the arbitration agreement states that the arbitral award is final and binding. Appeal is brought to the Supreme Committee for the Settlement of Labour Disputes.

The Labour and Workmen Regulation of 1969 stipulates that an arbitration agreement must be filed with the Primary Committee that has the jurisdiction to decide the dispute. Moreover, the arbitral award must be registered with that same Primary Committee within one week following its making.³⁰

2.1.2.1[iii] The Chambers of Commerce and Industry Regulation of 1980

This part will concentrate on the major elements which assist the Chambers of Commerce and Industry in the Kingdom of Saudi Arabia to have jurisdiction to practice and administer arbitration among their members. In the second section of

²⁹ EL-AHDAB, Abdul Hamid., *supra* note (24), p. 589.

³⁰ The Labour and Workmen Regulation of 1969, Arts. 183, 184 and 187; for further details, TURCK, Nancy B., *supra* note (2), pp. 430-31.

this chapter, the roles of the Chambers of Commerce and Industry as regards permanent institutional arbitration will be treated in detail.³¹

In 1980, an important regulation governing the Chambers of Commerce and Industry was promulgated by a Royal Decree.³² This Regulation has given the Chambers of Commerce and Industry the right to administer and resolve commercial and industrial disputes by conciliation and arbitration.³³

In 1981, the Implementation Rules of this Regulation were made by the Minister of Commerce Resolution No. 1871. They contain some provisions regulating the procedures applicable to commercial arbitration where one or more of the parties is a member of a Saudi Chamber of Commerce and Industry.

The first Chamber of Commerce and Industry in the Kingdom of Saudi Arabia, which was established in Jeddah in 1946, practised conciliation and arbitration amongst its members as one of its obligations and duties.³⁴

There is an argument between legal writers with regard to the influence of the Arbitration Regulation issued in 1983 on the jurisdiction of the Chambers of Commerce and Industry to administer arbitration. This argument will be discussed in the next section in the part concerned with the institutional arbitration as a type of arbitration in the Kingdom of Saudi Arabia.

2.1.2.1[iv] The Arbitration Regulation of 1983

In a very important step to promote the role of arbitration as a means of settling disputes arising from commercial transactions, the Council of Ministers decided to ratify the Arbitration Regulation by the Resolution No. 164 on the 4th of April 1983. The King also gave his approval by the Royal Decree No. M/46 on the 25th of April 1983. This Regulation was published in the Official Gazette, '*Um al-*

³¹ See below, pp. 64 *et seq.*

³² The Royal Decree No. M/6, dated 22/4/1400 A.H. (1980 A.D.).

³³ The Chambers of Commerce and Industry Regulation of 1980, Art. 5 (H).

³⁴ NADER, M. J., *supra* note (23), p. 1.

Kurā, on the 3rd of June 1983.

In 1985, its Implementation Rules were issued by the Council of Ministers Resolution No. 7/2021/M. These Rules have clarified numerous aspects regarding arbitration and specifically answered many of the questions left unanswered by the Arbitration Regulation of 1983.³⁵

The Arbitration Regulation of 1983 has given clear answers in respect of the arbitrators; their number, appointment, qualifications, replacement and fees, the language of arbitration, the applicable law, the method of making of the arbitral awards and their enforcement.

The main characteristics adopted by the Arbitration Regulation of 1983 may be classified as follows:

- (1)- This Regulation does not distinguish between the arbitration of commercial disputes and the arbitration of other forms of disputes, such as civil and real estate disputes.
- (2)- It recognises the validity of arbitration clauses concerning future disputes.
- (3)- It grants the Saudi Courts significant powers in the conduct and supervision of the arbitral process.³⁶

In recent years, the application of arbitration as a method of resolving disputes has extended to cover new aspects in the commercial domain, such as insurance disputes.³⁷ Moreover, the Committee, in order to mediate disputes between Saudi commercial agents and their principals or former principals, encourages the parties to submit their disputes to arbitration if they do not agree upon a settlement.³⁸

The Arbitration Regulation of 1983 and its Implementation Rules of 1985

³⁵ ALLAM, Niel F., *Arbitration in the Kingdom: The New Implementation Rules*, August 1985, vol. 8, no. 8, Middle East Executive Reports, p. 9.

³⁶ CHAUDHRI, M. & CLODFELTER, Mark A., *Commercial Arbitration in the Kingdom*, July 1985, vol. 8, no. 7, Middle East Executive Reports, p. 9.

³⁷ SFEIR, George N., *The Saudi Approach to Law Reform*, 1988, vol. 36, The American Journal of Comparative Law, p. 739.

³⁸ KRITZALIS, Alexander S., *Saudi Arabia*, 1992, vol. 26, no. 3, The International Lawyer, p. 828.

will be the main subject-matter of this thesis and they will be discussed in details in the following chapters of this thesis.

2.1.2.2 Development of arbitration regarding the Government or one of its Agencies

It is desirable to summarise the most important steps which the Saudi Government and one of its Agencies took with respect to the submission of their disputes to international commercial arbitration. The details and reasons for these steps will be set forth in the next section under the topic of the international arbitration as a type of arbitration.³⁹

From the early days of oil exploration until the 1950s, arbitration was the primary and favourable method of settling disputes between the Saudi Government or one of its Agencies and foreign private parties.⁴⁰ The Saudi Government used to include arbitration clauses in concession contracts concluded with foreign companies for the excavation of oil and other natural resources, such as the concession contract between the Kingdom of Saudi Arabia and the Arabian American Oil Company (Aramco) which contains an arbitration clause submitting any dispute between them, relating to the contract to arbitration.

In addition, the Kingdom of Saudi Arabia has become a party in the Convention of the Arab League of Nations concerning the Enforcement of Judgments and Awards since 1954. This Convention states that the arbitral awards issued in any of the Contracting States of the Arab League will be enforced in the other Contracting States.

The Riyadh Convention for the Judicial Co-operation concluded on the 6th of April 1983 has replaced the above convention and the Riyadh Convention contains the same provisions in respect of the recognition and enforcement of the arbitral

³⁹ See below, pp. 71 *et esq.*

⁴⁰ SAYEN, George., *supra* note (2), p. 214.

awards issued in any of the contracting states of the League.⁴¹ However, the Kingdom of Saudi Arabia has not ratified the Riyadh Convention of 1983 yet.⁴²

The Saudi Government's attitude toward international arbitration changed to the contrary after the loss by the Kingdom of Saudi Arabia in the famous Aramco Arbitration.⁴³

This new attitude was confirmed by the Council of Ministers Resolution No. 58 dated 17/1/1383 A.H. (1963 A.D.) which was a reaction to the arbitral award made in the Aramco Case.

The Resolution No. 58 forbade the submission of the dispute arising between the Saudi Government or one of its Agencies on the one hand, and private parties on the other to arbitration, whether a domestic or an international arbitration, without prior approval from the Council of Ministers. However, this Resolution contains certain exceptions as follows:

- (1)- Concession agreements where the Kingdom of Saudi Arabia finds “an ultimate interest” in including arbitration clauses in these agreements.
- (2)- Technical disputes may be resolved by arbitration. Consequently, the United States Army Corps of Engineers has inserted clauses providing for binding arbitration of technical disputes in its contracts to be executed in the Kingdom of Saudi Arabia.

The Resolution No. 58 has continued to apply so far, in spite the fact that the Kingdom of Saudi Arabia entered into certain international conventions which permit the resort to arbitration as a means of settling disputes.

In 1976, the Kingdom of Saudi Arabia concluded an agreement with the American Overseas Private Investment Corporation (OPIC) containing a clause which refers to arbitration any dispute between the Saudi Government or one of its

⁴¹ SĀMĪ, F. M., *al-Taḥkīm al-Tidjārī al-Dawli (International Commercial Arbitration)*, 2nd Ed., Amman, Jordan, 1992, pp. 81-95.

⁴² TURCK, Nancy B., *Arbitration in Saudi Arabia*, 1990, vol. 6, no. 3, *Arbitration International*, p. 290.

⁴³ Aramco Case will be explained in international arbitration in the next section, see below, pp. 73 *et seq.*

Agencies and an American investor guaranteed by OPIC.⁴⁴

This agreement was the first step to reduce the scope of the prohibition mentioned in the Resolution No. 58 issued in 1963. However, American investors can only profit from this agreement. A similar agreement is in force between the Kingdom of Saudi Arabia and Germany.⁴⁵

In 1980, the Kingdom of Saudi Arabia acceded to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, providing for arbitration as a method of resolving investment disputes between member States and nationals of other States who are parties to the Convention. Consequently, a State and a foreign private party may agree in writing upon referring to the International Centre for the Settlement of Investment Disputes (ICSID), as constituted under the Convention, any dispute arising out of an investment contract. The Kingdom of Saudi Arabia reserved the right to not refer all matters relating to petroleum and relating to national sovereignty to the arbitration of ICSID.⁴⁶

The ratification of the Washington Convention of 1965 re-establishes and promotes the possibility of foreign parties submitting their disputes with the Saudi Government or any of its Agencies to international arbitration. Moreover, this step is deemed a substantial shift in the Saudi Policy concerning international arbitration.⁴⁷

Neither the Government nor any governmental agency is known to have entered into any contract with a foreign private party containing an ICSID arbitration clause.⁴⁸ All matters regarding this Convention will be discussed in detail in Chapter

⁴⁴ EL-AHDAB, Abdul Hamid., *supra* note (24), p. 604.

⁴⁵ LERRICK, A. & MIAN, Q. J., *Saudi Business and Labour Law*, London, Graham & Trotman, 1982, p. 181.

⁴⁶ *Ibid.*, p. 181.

⁴⁷ ROUS, Simon., *Arbitration in Saudi Arabia*, August 1980, Saudi Business, p. 19; also MEED Staff., *Saudi Arabia accedes International Arbitration*, 1979, vol. 2, no. 11, Middle East Executive Reports, p. 8.

⁴⁸ MOANE, Eduardo., *Saudi Arabia and ICSID*, January 1993, vol. 16, no. 1, Middle East Executive Reports, p. 8.

seven.⁴⁹

In January 1994, the Kingdom of Saudi Arabia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.⁵⁰ This ratification is considered a great step forward for international arbitration in the Kingdom of Saudi Arabia. All matters concerning this Convention will be examined in detail in Chapter seven of this thesis.⁵¹

⁴⁹ See Chapter seven, pp. 399 *et esq.*

⁵⁰ The Royal Decree No. M/11, dated 16/7/1414 A.H.(1994 A.D.).

⁵¹ See Chapter seven, pp. 403 *et esq.*

2.2 Types of arbitration

This section regarding the types of arbitration can be divided into two sub-sections. The first sub-section will be devoted to deal with *ad hoc* and institutional arbitrations, whereas domestic and international arbitrations will be the subject of the second sub-section.

2.2.1 *Ad hoc* and institutional arbitrations

An *ad hoc* arbitration is conducted under the rules of procedure which may be selected to suit the facts of the dispute by the parties to dispute. These rules may be drawn up by the parties to the dispute or by the arbitral tribunal, or by some combination of the two or by one of the non-commercial international institution, such as the UNCITRAL Arbitration Rules.

By contrast, an institutional arbitration is conducted by one of many specialist arbitral institutions under its own rules of arbitration.⁵² The International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the International Centre for the Settlement of Investment Disputes (ICSID) are good examples.

2.2.1.1 *Ad hoc* arbitration

Ad hoc arbitration may arise on the basis of an arbitration clause or of a submission agreement. In this type of arbitration, the parties to the dispute have broad powers to choose substantive and procedural laws governing the arbitral process, and also to nominate the arbitral tribunal. Consequently, the co-operation of the parties to

⁵² Further details see CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *International Chamber of Commerce Arbitration*, 2nd Ed., New York, London & Rome Oceana Publications, INC.,; and Paris, ICC Publishing S. A., 1991, p. 50; also REDFERN, Alan & HUNTER, Martin., *supra* note (2), p. 13.

the dispute is necessary for an efficient and effective *ad hoc* arbitration.

On the other hand, the major defect in *ad hoc* arbitration is that the party unwilling to resort to arbitration may take advantage by delaying the arbitration proceedings.

In many important contracts involving a state party, disputes arising from these contracts are conducted on the basis of an *ad hoc* arbitration, particularly the disputes concerning oil concession contracts, such as the Aramco Arbitration.⁵³

In the Kingdom of Saudi Arabia, many arbitrations are carried out on *ad hoc* basis. There is no doubt that in *ad hoc* arbitration the arbitral tribunal has all powers entrusted to it by the Arbitration Regulation of 1983. At the same time, the arbitral tribunal must take into consideration and respect the procedural supervision of the judicial authority originally having jurisdiction over the dispute because the enforcement of the arbitral award requires an enforcement order which should be made by this competent authority.

According to the provisions of the Arbitration Regulation of 1983, the parties in *ad hoc* arbitration have powers to appoint arbitrators and to fix the time limits and arbitration procedure in their arbitration agreement. This agreement should be filed and approved by the authority originally having jurisdiction over the dispute which supervises the arbitral process from its outset to the enforcement of the arbitral award.⁵⁴

2.2.1.2 Institutional arbitration

As mentioned above, the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 have granted the Saudi Chambers of Commerce and Industry the authority to administer arbitration and to become the permanent arbitration institutions in the Kingdom of Saudi Arabia.⁵⁵

⁵³ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (52), p. 56.

⁵⁴ The Arbitration Regulation of 1983, Art. 6.

⁵⁵ See above, pp. 56 *et esq.*

In respect of the number of arbitration cases that have been resolved under the auspices of the Saudi Chambers of Commerce and Industry, secretaries of arbitration in Riyadh, Jeddah and *al-Dammām* Chambers of Commerce and Industry, which are the main Saudi Chambers of Commerce and Industry, informed me that there are no official statistics on this matter. However, the Secretary of arbitration in Riyadh Chamber of Commerce and Industry provided me the following statistics in respect of the number of arbitration cases administered under the supervision of Riyadh Chamber of Commerce and Industry;

- In 1987, there were six arbitration cases where three of them were decided in the same year.
- In 1988, there were seven arbitration cases where four of them were resolved in that year.
- In 1989, there were fourteen arbitration cases where only two cases decided in that year.

According to the Chambers of Commerce and Industry Regulation of 1980, the Saudi Chambers of Commerce and Industry have jurisdiction to resolve commercial and industrial disputes by arbitration, if these disputes were referred to them by the parties to the dispute.⁵⁶ The Implementation Rules of this Regulation embody some provisions governing the arbitral process. These provisions govern the time period, the nomination of the arbitrators and their replacement, and the procedure to be followed before the arbitral tribunal.

Where two Saudi merchants or industrialists belonging to one Chamber of Commerce and Industry agree to settle a dispute amongst them by arbitration, they should present a written request signed by them to the Chairman of the Board of Directors of their Chamber.⁵⁷

The arbitral tribunal is usually composed of three arbitrators. each party appoints an arbitrator by himself and the Chairman of the Chamber appoints a neutral arbitrator to preside over the arbitral tribunal. If any arbitrator fails to appear or

⁵⁶ The Chambers of Commerce and Industry Regulation of 1981, Art. 5(h).

⁵⁷ The Chambers' Rules of Implementation of 1981, Art. 49.

apologises himself from attendance without a justified excuse, the Chairman of the Chamber will nominate someone to replace him.

The presiding arbitrator sets the hearing date and notifies it to the parties to the dispute after consultation with other arbitrators. Each party has the right to be represented by a counsel at the hearing. The arbitral award should be made within three months of the first hearing date and signed by the presiding arbitrator and at least one of the other arbitrators, unless the parties to the dispute have agreed upon otherwise. The parties to the dispute are entitled to a copy of the award.

Where the two parties to the dispute belong to more than one Chamber of Commerce and Industry, or where one of them is a foreigner, the written request signed by them should be presented to the President of the Board of the Saudi Chambers of Commerce and Industry who assumes the role regarding the appointment of the presiding arbitrator. As well, the arbitral process takes place in accordance with the same procedure.⁵⁸ The Legal Department in each Chamber of Commerce and Industry usually acts as the clerk of the arbitral process where it selects one of its staff as the secretary of arbitration.

It is highly desirable to define the parties who have the right to resort to arbitration under the supervision of the Saudi Chambers of Commerce and Industry. There are two kinds of persons that may be parties to the Chambers Arbitration; a member of a Saudi Chamber and a foreigner who has a dispute with one of its members.

2.2.1.2[i] A member of a Saudi Chamber of Commerce and Industry

Membership of a Saudi Chamber of Commerce and Industry is not restricted to a merchant or to an industrialist in the narrow sense but any legally organised self-employed person, such as a doctor, lawyer, engineer, marine agent and real estate agent can be a member in a Saudi Chamber of Commerce and Industry. According to this wide definition, some legal writers consider that any member of a Saudi

⁵⁸ Ibid., Arts. 49-54.

Chamber of Commerce and Industry can resort to the Chambers Arbitration.⁵⁹

By contrast, some other legal writers think that the arbitration provisions existing in the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 use limiting words (merchant, industrialist and commercial and industrial disputes). For example, Article 5(h) of the Chambers of Commerce and Industry Regulation of 1980 states that:

" The settlement of *commercial and industrial disputes* by arbitration if the parties agree to refer the dispute to them (the Chambers)."

Moreover, Article 49 of the Chambers' Rules of Implementation of 1981 provides that:

" Where *two Saudi merchants or industrialists* belonging to one Chamber of Commerce and Industry agree to resolve a dispute among them by arbitration."

Accordingly, those legal writers think that the right to have recourse to arbitration is restricted merchants and industrialists who are members in the Chambers of Commerce and Industry.

However, the Chambers of Commerce and Industry in practice grant all their members, whether merchants, industrialists, lawyers or engineers, the right to have recourse to the Chambers Arbitration on the basis that these members have the same rights and obligations stated in the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981.

2.2.1.2[ii] A foreigner having a dispute with a member of a Saudi Chamber of Commerce and Industry

Foreign party means any non-Saudi natural or legal person. One legal writer deems that the rules applicable to non-Saudis should apply to the case where one of the parties has a Saudi nationality but he is not a member of any Saudi Chamber of

⁵⁹ NADER, M. J., *supra* note (23), pp. 9-10.

Commerce and Industry.⁶⁰

Before the issue of the Arbitration Regulation of 1983, some Saudi Chambers of Commerce and Industry, particularly Jeddah Chamber of Commerce and Industry broadly practised arbitration even though the arbitral award generally remained not binding. The enforcement of the arbitral award was dependent on the conviction of the governor of the province that the award is fair.⁶¹ A party was entitled to ask the governor to enforce the arbitral award issued in his case.

When disputes are between foreign and Saudi private parties, the foreign party usually prefers that arbitration takes place under the auspices of Jeddah Chamber of Commerce and Industry which has long experience and a reputation for integrity. The award resulting from arbitration is likely to be enforced without *de novo* review of the merits of the dispute.⁶²

The issue of the Arbitration Regulation of 1983 caused strong argument whether or not the Saudi Chambers of Commerce and Industry were stripped of their jurisdiction to administer and settle disputes by arbitration.

One legal writer considers that the Saudi Chambers of Commerce and Industry have in fact lost their competence to administer and resolve disputes by arbitration because the Chambers are not one of the authorities originally having jurisdiction over the dispute. These authorities may be one of the following:

- 1- *The Shari'ah Courts.*
- 2- The Board of Grievances.
- 3- The Commission for the Settlement of Commercial Disputes.⁶³
- 4- The Committee for the Settlement of Labour Disputes.⁶⁴

⁶⁰ LERRICK, A. & MIAN, Q. J., *supra* note (45), p. 191, mentioned in note (75).

⁶¹ HUSHAN, Mohammed., *supra* note (28), p. 4.

⁶² MOORE, Michael T. & LOTT, Lesile J., *Arbitration under the Saudi Legal System*, February 1981, vol. 4, no. 2, Middle East executive Reports, p. 13.

⁶³ The competence of this Commission was moved to the Board of Grievances , see above, Chapter one, p. 30.

⁶⁴ SALEH, Samir., *supra* note (24), pp. 296-97.

By contrast, some legal writers deem that the Saudi Chambers of Commerce and Industry still have their jurisdiction to administer and settle disputes among their members by arbitration if they wish because the Royal Decree No. M/46 regarding the Arbitration Regulation of 1983 expressly states that only the arbitration provisions existing in the Commercial Court Regulation of 1931 are repealed. Consequently, it can be concluded that the intention of Saudi legislator does not aim to abrogate the arbitration provisions existing in the other regulations, such as the Labour and Workmen Regulation of 1969, and the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981.⁶⁵

It seems that the arbitration provisions existing in the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 are valid. But, at the same time, the Saudi Chambers are not one of the authorities originally having jurisdiction over the dispute. In general, the Board of Grievances is the competent authority to resolve commercial disputes. Article 10 of the Arbitration Regulation of 1983 states that the parties to the dispute have the right to adopt a "special clause" in their arbitration agreement which refers any problem arising during the arbitral process, such as the resignation of one or more of arbitrators to a particular institution.

Accordingly, the parties to the dispute may insert a special clause in their arbitration agreement which defines one of the Saudi Chambers of Commerce and Industry as a particular institution to resolve any question arising during the arbitral process. In this case, the authority originally having jurisdiction over the dispute, such as the Board of Grievances does not intervene on the basis that the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 contain arbitration provisions which are capable of settling questions which may arise during arbitration proceedings.⁶⁶

However, the Saudi Chambers of Commerce and Industry are not judicial bodies and have no enforcement powers by themselves to review and enforce the

⁶⁵ NADER, M. J., *supra* note (23), p. 7; also ALLAM, Niel F., *supra* note (35), p. 15.

⁶⁶ EL-AHDAB, Abdul Hamid., *supra* note (24), pp. 596-97.

2.2.2 Domestic and international arbitrations

The parties to domestic arbitration are normally the citizens or residents of the same country. In domestic arbitration, arbitration takes place inside the country and its law applies to the dispute.

Whereas, arbitration is considered international, when the parties to the dispute are from different countries or the dispute relates to international trade, such as the movement of goods between two or more countries.

The distinction between domestic and international arbitrations is important in practice because amongst countries which have a developed law of arbitration, it is commonly recognised that more freedom may be allowed in an international arbitration than is usually allowed in a domestic arbitration.⁶⁸

2.2.2.1 Domestic arbitration

In the Kingdom of Saudi Arabia, domestic arbitration means that the parties to the dispute should be Saudis or one of them is a foreigner residing in the Kingdom of Saudi Arabia. The Arbitration Regulation of 1983, and other Saudi substantive and procedural laws are applicable and the arbitration takes place inside the Kingdom of Saudi Arabia.

Domestic arbitration may be either an institutional arbitration, such as the Chambers of Commerce and Industry Arbitration, or an *ad hoc* arbitration. As well, it may result either from an arbitration clause or a submission agreement.

The Arbitration Regulation of 1983 does not distinguish between domestic

⁶⁷ SAYEN, George., *supra* note (2), mentioned in note (150), p. 242.

⁶⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (2), p. 14.

and international arbitrations. However, before this Regulation, it had been distinguished between these types of arbitration. For example, the Saudi Government approved an international concession agreement containing an arbitration clause between a Saudi Governmental Agency and the Auxirap Company in 1965, although according to the Resolution No. 58 issued in 1963 such an arbitration clause was forbidden in domestic arbitration.⁶⁹

Some legal writers think that arbitration in which one of the parties is the Saudi Government or one of its Agencies is prohibited in all cases, whether it is domestic or international, unless the consent of the President of the Council of Ministers is obtained.⁷⁰ However, other legal writers have formed the opinion that the prohibition of the Saudi Government or one of its Agencies to resort to arbitration applies only to arbitration held outside the Kingdom of Saudi Arabia.⁷¹

It seems that the second opinion is without merit because Resolution No. 58 contains a general provision which prohibits the Saudi Government and its Agencies to resort to arbitration, whether domestic or international arbitration, unless the President of the Council of Ministers has granted the Saudi Government or one of its Agencies the permission to resort to arbitration.

2.2.2.2 International arbitration

It can be said that arbitration is international where disputes arising out of the contracts regarding circulation of goods or other products across frontiers or where the disputes arise from contracts concluded between nationals of different countries or between states and nationals of other countries. In general, an arbitration is

⁶⁹ EL-AHDAB, Abdul Hamid., *Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985*, 1986, vol. 3, no. 5, Part 1, Journal of International Arbitration, p. 32.

⁷⁰ VAN DEN BERG, Albert Jan., *National Reports, Saudi Arabia*, The Yearbook of Commercial Arbitration, 1984, p. 10; also AL-SAMMAN, Yahya., *The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia*, 1994, vol. 9, Part. 3, Arab Law Quarterly, p. 220.

⁷¹ LERRICK, A. & MIAN, Q. J., *supra* note (45), p. 177.

international if it relates to aspects of international trade.⁷²

This part will distinguish between international arbitration in which the parties to the dispute are Saudis on the one hand and foreigners on the other, and arbitration in which the parties to the dispute are the Saudi Government or any of its Agencies and foreigners.

Disputes, in which the parties are Saudis and foreigners, may be submitted to an institutional arbitration, such as ICC Arbitration or to an *ad hoc* arbitration. In this case, the parties to the dispute may choose the place of arbitration, the law governing arbitration procedure, and the members of the arbitral tribunal. For example, the facilities of the International Chamber of Commerce (ICC) Arbitration had been utilised on more than 30 cases since 1975 to settle business disputes involving Saudi parties.⁷³

In the Kingdom of Saudi Arabia, arbitration is considered international, when the parties to the dispute choose the place of arbitration outside the Kingdom of Saudi Arabia, a foreign law applicable to the arbitration proceedings, a foreign law governing the dispute and foreign arbitrators, or at least one of these matters are foreign.⁷⁴

Prior to adopting the New York Convention of 1958, it was difficult to enforce the arbitral awards rendered abroad in the Kingdom of Saudi Arabia. These awards were subject to a *de novo* review procedure by a Saudi court having jurisdiction and this court would apply Saudi law.⁷⁵

Before the Aramco Case, the Kingdom of Saudi Arabia used to include in its concession contracts with foreign private parties clauses which refer any dispute to arbitration. However, the arbitral award rendered in the dispute between the Saudi

⁷² EL-AHDAB, Abdul Hamid., *supra* note (24), p. 596.

⁷³ SAYEN, George., *supra* note (2), mentioned in note (19), p. 216. I failed to find any official source concerning the number of cases which had been decided according to the ICC Arbitration Rules and which involved Saudi parties after the period from 1975 to 1987.

⁷⁴ SALEH, Samir., *supra* note (24), p. 322.

⁷⁵ SABA, H., *Investment Climate: Its Risks and Returns*, October 1986, Middle East Executive Reports, p. 19.

Government and the Arabian American Oil Company (Aramco) led to a considerable change in the Saudi attitude relating to arbitration as a method of settling disputes.

2.2.2.2[i] Aramco Case⁷⁶

In 1954, the Saudi Government entered with Greek shipping magnate Mr. Aristole Onassis into an agreement which was ratified by the Royal Decree No. 5737 issued on 09/04/1954. This Agreement gave Mr. Onassis the right to form a local company with the name of Saudi Arabian Tanker Company (Satco). It contained a number of provisions which imposed reciprocal obligations on both parties, such as Satco had to establish a maritime institute in Jeddah in the Kingdom of Saudi Arabia and to employ the graduates of this institute in its tankers, also to transport without charge fifty thousand tons of oil or petroleum products from Saudi ports on the Arabian Gulf to any other Saudi port on the Red Sea.⁷⁷

Article IV of the Agreement gave Satco a right of priority for the transport of oil out the Kingdom of Saudi Arabia for a period of thirty years from the date of signing of the Agreement, renewable for a further period by mutual consent of the parties.

This Article was the direct cause of the dispute between the Saudi Government and the Arabian American Oil Company (Aramco) because Aramco refused to comply with the text of this Article, asserting that it had an absolute right under its Concession Agreement of 1933 with the Saudi Government to choose the necessary means of transport of oil, including foreign tankers.

The Saudi Government had always tried to settle in a friendly-manner the

⁷⁶ The Aramco Case has been discussed in certain books and articles, particularly the following references:

- (a)- *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 International Law Reports (I.L.R.). 1963, pp. 117 et seq.
- (b)- EL-AHDAB, Abdul Hamid., supra note (24) and references mentioned in note (2), p. 598.
- (c)- VAN DEN BERG, Albert Jan., supra note (70), p. 15.
- (d)- SAYEN, George., supra note (2), p. 214.

⁷⁷ The Agreement between the Saudi Government and Satco, Art. 5.

dispute which arose in respect of Article IV of the Onassis Agreement.⁷⁸ However, Aramco insisted on its request that Article IV to be modified or deleted. So, the Saudi Government suggested to refer the dispute to arbitration in Geneva.

In February 1955, the Saudi Government and Aramco concluded an arbitration agreement which contained questions arising from the parties as follows:⁷⁹

2.2.2.2[i][A] Questions submitted by the Saudi Government

1- Whether Aramco has rights to transport of oil and other products, which the company produces and sells, by sea?

2- If Aramco has any such rights,

a)- Whether, and to what extent, Aramco was or is entitled in the absence of consent by the Government to transfer any such rights in connection with transportation by sea of oil obtained under the Concession Agreement to any other person, company or corporation (for example to its buyers)?

b)- Whether Aramco has acquired any such rights to refuse or deny a Government-requested preferential treatment to tankers flying the Saudi flag, and in the event of Aramco not having acquired such right, whether it has violated its obligations under the Concession Agreement?

3- Whether the Concession Agreement entitles Aramco to deny preference for priority to national tankers, particularly when the cost of transportation of the oil it produces and sells is not going to be higher than the annual average cost of transportation of Aramco in using non-national tankers?

2.2.2.2[i][B] Question submitted by Aramco

Was Article IV of the Agreement between the Saudi Government and Mr. A.

⁷⁸ Saudi Arabia v. Arabian American Oil Company (Aramco), *supra* note (76) a. p. 130.

⁷⁹ *Ibid.*, pp. 130-31.

Onassis as amended on 07/04/1954 in conflict with the Aramco Concession Agreement of 1933?.

In this case, it is appropriate to note that neither of the parties claimed damages for an alleged injury. This dispute was clearly limited to legal question. It relates to the interpretation of the Concession Agreement of 1933 and not to its validity. The question to be decided was whether Aramco could be compelled to use for the transportation of oil and oil products on the high seas tankers which they have not freely chosen, and whether the rights granted to Aramco under its Concession Agreement authorise the Company to resist the implementation of Article IV of the Onassis Agreement.⁸⁰

2.2.2.2.[i][C] The Law to be applied

The arbitration agreement contained the following provision in respect of the law to be applied to the relationship existing between the parties:

“ The Arbitration Tribunal shall decide this dispute
 (a)- in accordance with the Saudi Arabian law as hereinafter
 defined in so far as matters within the jurisdiction of
 Saudi Arabia are concerned;
 (b)- in accordance with the law demand by the Arbitration
 Tribunal to be applicable, in so far as matters beyond the
 jurisdiction of Saudi Arabia are concerned;
Saudi Arabian law, as used herein, is the Moslem law
 1- as taught by the school of Imam Ahmed ibn Hanbal;
 2- as applied in Saudi Arabia.”⁸¹

The method of drawing a distinction between matters within the jurisdiction, and matters beyond the jurisdiction of the Kingdom of Saudi Arabia has been the subject of controversy.

Aramco claimed that the general principles of law recognised by civilised nations should be applied to the dispute because the Concession Agreement of 1933

⁸⁰ Ibid., pp. 144-45.

⁸¹ The Arbitration Agreement between the Saudi Government and Aramco, Art. 4.

was an international agreement. It also contended that, in view of the international nature of the Concession Agreement, Saudi law should only be applied to matters of local nature. The Saudi Government replied that the Onassis Agreement complied with the contents of the Concession Agreement granted to Aramco, *the Sharī'ah*, the general principles of law recognised by civilised nations, and the International Law.

Although the parties agreed upon the applicability of the Saudi law, the Concession Agreement provisions, the general principles of law recognised by civilised nations and the International Law, they disagreed upon how these rules should be interpreted and applied.

2.2.2.2.[i][C](i) The opinion of the Arbitration Tribunal⁸²

In order to determine what law is to be applied, resort must be had to the principles of private international law known as the autonomy of the will. According to these principles, in any agreement presenting an international character, the law explicitly chosen by the parties should first be applied. As the parties to arbitration gave the Arbitration Tribunal a board discretion in this aspect, it was free to choose the rules of law applied to the dispute, provided its choice was objective and was justified.⁸³

The Arbitration Tribunal legally considered both clauses (a) and (b) of Article IV of the arbitration agreement were on the same level and both parties were fully aware to the fact that various systems of law must be applied to the different matters connected with the operation of oil concession.⁸⁴

The Tribunal concluded from the parties' agreement to hold arbitration in Geneva, Switzerland, that they had intended from the very beginning to withdraw

⁸² The Arbitration Tribunal was composed of Mr. H. Badawi was nominated by the Saudi Government. He died during the arbitration proceedings and was replaced by Mr. M. Hassan. The Aramco appointed Mr. S. Habachy. The President of the International Court of Justice appointed Mr. V. Sauser-Hall as the chairman of the Arbitration Tribunal.

⁸³ Saudi Arabia v. Arabian American Oil Company (Aramco), *supra* note (76) a. p. 166.

⁸⁴ *Ibid.*, p. 154.

their disputes from the jurisdiction of Saudi courts.⁸⁵

The Tribunal applied the Saudi law derived from *the Sharī'ah* according to *the Ḥanbalī* school to the Concession Agreement of 1933 and it found that:

“The régime of mining concession, and, consequently, also of oil concession, has remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another, unless this is done by an act of authority. *Ḥanbalī* law contains no precise rule about mining concessions and *a fortiori* about oil concessions.”⁸⁶

According to Moslem law, the King, *Imām*, has the power to adopt laws necessary for the protection of the general interest. He can resort to a régime of oil concessions based on an agreement, provided that this solution is not contrary to Moslem law. The Tribunal held that:

“The concession contract does not conflict with these rules, *rules of Moslem law*, since it is in conformity with two fundamental principles of the whole Moslem system of law, *i.e.*, the principle of liberty to contract within the limits of Divine Law, and the principle of respect for contracts.”⁸⁷

Accordingly, the Tribunal considered that the Concession Agreement of 1933 is a part of the Saudi legal system where it is not contrary to Moslem law. The Concession Agreement is thus the fundamental law of the parties and the Tribunal is bound to recognise its importance where it fills gaps in the Saudi law with regard to the oil industry.

The Tribunal also found that the law of Switzerland, where the arbitration was held, cannot be applied to the arbitration on the basis of the principle of the jurisdictional immunity of foreign States recognised by international law because one of the parties to the arbitration was a State.⁸⁸

⁸⁵ Ibid., p. 154.

⁸⁶ Ibid., p. 163.

⁸⁷ Ibid., p. 163.

⁸⁸ Ibid., p. 155.

The Tribunal considered that matters pertaining to private law are governed by the Saudi law, but that law must, in case of need, be interpreted or supplemented by the general principles of law recognised by civilised nations, by custom and practice in the oil business, and by notions of pure jurisprudence. As regards the international effects of the Aramco Concession Agreement, such as the effects of the sale and transport of the oil and oil products to foreign countries, the Tribunal held that these effects are regulated by the custom and practice prevailing in maritime and in the international oil business.⁸⁹

Finally, the Tribunal considered that public international law should be applied to the effects of the Concession concerning matters which are not governed by any rules of the municipal law of any State, as is the case in all matters regarding transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of State for the violation of its international obligations.⁹⁰

The Tribunal organised the laws to be applied to the case as follows:

- 1)- The Saudi law according to *the Ḥanbalī* school.
- 2)- The Saudi law would be complemented by the general principles of law recognised by civilised nations, by custom and practice in the oil industry, and by notions of pure jurisprudence.
- 3)- Finally, public international law, academic writing, and case law.

2.2.2.2[i][D] *The Arbitral Award*⁹¹

The Arbitration Tribunal decided to answer the questions submitted to it by the Saudi Government and Aramco as follows:

⁸⁹ Ibid., pp. 171-2.

⁹⁰ Ibid., pp. 171-2.

⁹¹ For details about the Award, see Ibid., pp. 226-28.

2.2.2.2[i][D](i) Questions submitted by the Saudi Government

1- The Concession Agreement of 1933 grants to Aramco an exclusive right to transport oil and its products by land and sea within the Kingdom of Saudi Arabia, within the territorial waters of the Kingdom of Saudi Arabia and on the high seas to all foreign countries overseas.

2- (a)- Aramco has an exclusive right to transport and export by sea the oil it extracts and its products in a manner which conforms to its Concession Agreement. It has not made an assignment of its exclusive right of transport to its buyers, or to any person, company or corporation. The question as to whether, and to what extent, Aramco is entitled to transfer its rights and obligations under its Concession Agreement does not come up for consideration.

(b)- Aramco cannot be forced to recognise a right of priority or preference, contrary to its exclusive right, in favour of any tankers, by whomsoever they may be owned or whatever flag they may fly.

3)- The Saudi Government may not compel Aramco to recognise a right of priority or preference to tankers flying any flag whatsoever, irrespective of any consideration of the economic consequences of this right or of whether the cost of transportation is going to be less or more than the current freight, or equal to it.

2.2.2.2[i][D](ii) Question submitted by Aramco

Article IV of the Onassis Agreement with the Saudi Government of 1954 which grants right of priority or preference to Satco for a period of thirty years, is in conflict with the Aramco Concession Agreement of 1933 and is not effective against Aramco.

This award led the Kingdom of Saudi Arabia to become hostile to resolve its disputes by arbitration outside its territory or under non-Saudi law.

The dissatisfaction of the Saudi Government with the award cannot be adequately explained merely by the fact that it lost, since the Onassis Agreement of 1954 was not really very advantageous for the Kingdom of Saudi Arabia. The

dissatisfaction can perhaps be better explained by more general Saudi concerns over the ability and willingness of foreign arbitrators to apply Saudi law to disputes involving the Saudi Government or one of its Agencies.⁹²

The Saudi Government submitted that *the Sharī'ah* contained rules which could be applied to oil concessions. The Arbitration Tribunal rejected the Saudi submission and applied instead general principles of law and public international law as the governing law of contract.

The applicability of public international law to contracts between States and foreign investors has been subject to great controversy. The prevailing view is that international law may not be applied in the absence of express choice of law.⁹³

2.2.2.2[ii] The Resolution No. 58

In 1963, the Council of Ministers issued an important resolution which forbade the Saudi Government or any of its Agencies to have recourse to arbitration. This resolution was known under the name of Resolution No. 58. It stipulates that:

- " a- It is prohibited for any Governmental Agency to insert in a contract a clause providing for the jurisdiction of any foreign courts or any foreign body having judicial competence, to the effect of excluding the jurisdiction of the Board of Grievances.
- b- It is not permitted for any Governmental Agency to accept arbitration as a means of resolving disputes which may arise between it and contracting individuals and companies.
- c- It is prohibited for any Governmental Agency to designate any foreign law to govern its relation with any relevant body as the applicable law shall be the Saudi law ".⁹⁴

However, the Resolution makes two exceptions as follows:

⁹² SAYEN, George., *supra* note (2), p. 214.

⁹³ PAASIVERTA, Esa., *Participation of States in International Contracts*, Helsinki, Finnish Lawyers' Publishing Company, 1990, pp. 77-113; 151-196.

⁹⁴ VAN DEN BERG, Albert Jan., *supra* note (70), p. 14-15; also McQUAID, Richard F., *Foreign Arbitral Awards: Can They Be Enforced?*, May 1979, vol. 2, no. 5, Middle East Executive Reports, pp. 2-3.

(1)- Concession agreements which contain utmost interests for the Saudi Government. These agreements may include clauses submitting any disputes arising out of them to arbitration.

The criteria of the definition of “an utmost interest” is ambiguous. However, major governmental projects, such as national defence projects usually have utmost interests for the State. Consequently, the disputes arising out of these projects may be settled by arbitration.

In 1969, one of the Governmental Agencies, Petromin Company, entered with a French company into an agreement which included a clause for ICC Arbitration to be held in Lausanne, Switzerland, if a dispute arose on the basis of the utmost interest exception.⁹⁵

(2)- Technical disputes could be submitted to arbitration.

In this case, the Board of Grievances nominates the third arbitrator, if the other arbitrators appointed by the parties are unable to agree upon one. The arbitral award may be appealed before the Board of Grievances.⁹⁶

Therefore, the United States Army Corps of Engineers has inserted clauses submitting technical disputes arising out of the contracts executed in the Kingdom of Saudi Arabia to arbitration.⁹⁷

The question may arise in respect of the determination which Governmental Agencies are prohibited from resorting to arbitration. It may be stated that the more the Governmental Agency is subject to the labour and commercial laws in its financial administration, and in judicial jurisdiction over its disputes, the more possible it is to resort to arbitration and vice versa.⁹⁸

The Resolution No. 58 deals with only the Saudi Government and its Agencies where it prohibits them to submit their disputes to arbitration. The Resolution does not deal with the Saudi private parties, whether natural or legal

⁹⁵ LERRICK, A. & MIAN, Q. J., *supra* note (45), p. 178.

⁹⁶ *Ibid.*, p. 178.

⁹⁷ *Ibid.*, p. 178.

⁹⁸ EL-AHDAB, Abdul Hamid., *supra* note (24), p. 603.

person. So, Saudi private parties can resolve their disputes by arbitration.

2.2.2.2[iii] The Agreement with the American Overseas Private Investment Corporation (OPIC)

The Kingdom of Saudi Arabia entered with the American Overseas Private Investment Corporation (OPIC) into an agreement in 1976.⁹⁹ This agreement included a clause which submitted to arbitration any dispute between the Saudi Government or one of its Agencies and any American investor insured by OPIC.

Arbitration must be preceded by a three-month period of negotiations between the Saudi and American Governments. If such negotiations fail, then either Government may submit the dispute to arbitration. The private parties involved are not allowed to participate in the arbitration because the two Governments replace them.¹⁰⁰

The arbitral tribunal is composed of three arbitrators, one is nominated by each government, and a president is appointed by the mutual consent of the two arbitrators.¹⁰¹ If either government fails to nominate its arbitrator, the other government has the right to request the President of the International Court of Justice to do so. However, the agreement does not set forth the body which appoints the third arbitrator when the two arbitrators are unable to agree upon such appointment.

The applicable law is international law because the parties to the dispute are states. The arbitral tribunal has the authority to determine the procedure to be followed during the arbitral process, and its award is final and binding on both governments.¹⁰²

This agreement was one of the most important factors to reduce the scope of

⁹⁹ The Royal Decree No. M/22, dated 29/03/1395 A.H. (1976 A.D.).

¹⁰⁰ Article 3 (a) (b) and (c) 2 of the Agreement.

¹⁰¹ Ibid., Art. 3 (c) 1.

¹⁰² Ibid., Art. 3 (c) 2 and 4.

the prohibition on resorting to arbitration as a means of settling disputes existing in Resolution No. 58 even though the agreement has been applied to contracts which their parties are only Saudis and Americans.

2.2.2.2[iv] The Convention on the Settlement of Investment Disputes of 1965

In 1980, the Kingdom of Saudi Arabia ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965. This step means that the Kingdom of Saudi Arabia has confirmed its acceptance of international arbitration as a method of resolving disputes. The Kingdom of Saudi Arabia explicitly excluded investment disputes belonging to oil and acts of sovereignty from the scope of this Convention.

According to this Convention, the parties to dispute may consent in writing to submit any dispute arising directly out of their investment contract to the International Centre for the Settlement of Investment Disputes (ICSID) in Washington.

The ratification of this Convention led to reduce the scope of the prohibition imposed on the Saudi Government and its Agencies, even if the Convention only deals with disputes arising out of investment contracts concluded between the Saudi Government or one of its agencies on one hand and foreign investors on the other.

It was arguable that the Washington Convention of 1965 would supersede the Resolution No. 58 which prohibits the Saudi Government and its Agencies from resorting to international arbitration.¹⁰³

Certain legal writers think that the legal effectiveness of this Convention in the Kingdom of Saudi Arabia is suspended because the Convention was not published in the Official Gazette, *'Um al-Ḳurā*.¹⁰⁴

¹⁰³ MOANE, Eduardo., *supra* note (47), p. 8; MEED Staff., *supra* note (46), p. 8; also JALILI, Mahir., *Saudi Arabia considers arbitration regulations*, 1982, International Finance Law Review, p. 17.

¹⁰⁴ AL-ḤANFĀWĪ, A., *'Uṣūl al-Tashrī' fī al-Mamlakah al-'Arabiyyah al-Sa'ūdiyyah (The*

It is difficult to agree with this view because many Saudi regulations, which have not been published in the Official Gazette, are legally effective. As well, many Saudi regulations state by their own terms that they shall not be effective unless they are published in the Official Gazette, 'Um al-Ḳurā. The Royal Decree which approved the Washington Convention of 1965 does not contain any term regarding the publication of the Convention in the Official Gazette.¹⁰⁵

Article 42 of the ICSID Convention states that the arbitral tribunal shall decide any dispute in accordance with the law agreed upon by the parties to the dispute. The Resolution No. 58 explicitly provides that it is not permitted for any governmental agency to designate any foreign law to govern its disputes with a third party.

The question which may arise is whether the Saudi Governmental Agencies are able to submit their disputes with foreign investors to the ICSID arbitration and to select a non-Saudi law as the applicable law to the disputes without an advance permission from the Council of Ministers.

It seems that the advance permission of the Council of Ministers is required before resorting to the ICSID arbitration and before selecting a non-Saudi law as the applicable law to the dispute. Legal writers have reached different views in respect of this question.¹⁰⁶

2.2.2.2[v] The New York Convention of 1958

The Kingdom of Saudi Arabia took other important steps with respect to recognising the importance of international arbitration as an effective means of resolving disputes relating to international trade transactions. An important development took place when the Kingdom of Saudi Arabia entered into the New

Principles of Legislation in the Kingdom of Saudi Arabia), Undated, p. 119.

¹⁰⁵ LERRICK, A. & MIAN, Q. J., *supra* note (45), p. 181; also EL-AHDAB, Abdul Hamid., *supra* note (24), p. 605.

¹⁰⁶ For the details of these views, see Chapter seven, p. 399.

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in
January 1994.¹⁰⁷

¹⁰⁷ The Royal Decree No. M/11, dated 16/07/1414 A. H. (1994 A.D.). For details concerning the ratification of this Convention by the Kingdom of Saudi Arabia, see below, pp. 403 *et esq.*

Chapter three

The Arbitration Agreement

The arbitration agreement is considered one of the most essential parts of the arbitral process. It usually contains the provisions governing many major elements regarding arbitration, such as the composition of the arbitral tribunal, the applicable law and the place of arbitration.

This chapter will treat the main aspects of the arbitration agreement. It will be divided into three sections as follows:

- Form and contents of the arbitration agreement.
- Provisions as to the validity of the arbitration agreement.
- Effects of the arbitration agreement.

This chapter will set forth the position in the national arbitration laws of various countries, and the international and institutional rules governing arbitration as a method of resolving disputes. Then, it will explain the position in the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

3.1 Form and contents of the arbitration agreement

The agreement to arbitrate shows that the parties to the dispute have consented to settle their disputes by arbitration. This consent is essential for the validity of arbitration.

There are two main types of arbitration agreement. The first is an agreement to submit specific existing disputes to arbitration; this agreement takes the form of a submission agreement. The second is an agreement to refer future disputes to

arbitration. Such type of agreement is normally in the form of an arbitration clause within another agreement.¹

Moreover, there are other types of arbitration agreement, such as when two or more parties enter into a general contract which contains several specific contracts and this contract includes a general provision which states that any dispute arising out of one of these specific contracts is resolved by arbitration. A specific submission agreement will be established to regulate a particular dispute. Contracts of importation and exportation of different kinds of goods, such as fruits and vegetables, are examples where this technique is used.

Construction contracts usually contain clauses referring any dispute, whether technical, financial or legal, arising from the performance of these contracts to arbitration.

This section will be divided into three sub-sections. The first will deal with the submission agreement and the arbitration clause will be the subject of the second sub-section. The third sub-section will deal with the position in the Kingdom of Saudi Arabia.

3.1.1 Submission agreement

The parties may draw up an agreement to refer their existing disputes arising from the performance of the main contract, whether or not this contract contains an arbitration clause, to arbitration. In fact, the parties to the dispute need to make a submission agreement even if there is an arbitration clause because they will determine the types of disputes which are settled by arbitration and they will appoint the members of the arbitral tribunal and all matters with which the arbitration clause does not deal.

There is not any specific form for a submission agreement. However, the submission agreement contains the most important provisions which usually regulate

¹ REDFERN, Alan & HUNTER, Martin., *Law and Practice of International Commercial Arbitration*, 2nd Ed., London, Sweet & Maxwell, 1991 p. 130.

matters concerning the arbitral process, such as the kind of disputes submitted to arbitration, the method of the constitution of the arbitral tribunal, the determination of the applicable law, the place of arbitration, the expenses of arbitration, the production of documents, hearings, the appointment of experts and the methods of enforcement of the arbitral award. In addition, it can include more details relevant to the efficiency of the arbitration than an arbitration clause because the parties can specifically decide the procedures which fit the nature of the existing dispute.

3.1.2 Arbitration clause

The use of arbitration clauses developed and spread in the thirties of this century. Before that, arbitration was generally limited to submission agreements which have become a secondary way of arbitration.²

An arbitration clause often forms a part of commercial contract. The extent of an arbitration clause may be widened or narrowed according to the wishes of the parties. For example, the parties may insert a clause in their contract that only technical disputes arising out of the performance of this contract are submitted to arbitration. However, an arbitration clause can not extend to cover matters which are not arbitrable under the law governing it and the main contract, or under the applicable law of the arbitration clause or the applicable law of the main contract when their applicable laws are different.³

An arbitration clause is often a general clause which submits the parties to arbitration when disputes arise between them during the execution of the major contract, but it does not contain all the main elements required to start the arbitral process, such as the determination of the types of disputes settled by arbitration, the names of arbitrators, the procedure applied for the arbitral process and so on.

² EL-AHDAB, Abdul Hamid., *Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985*, 1986, vol. 3, no. 5, Part 1, Journal of International Arbitration, p. 33.

³ REDFERN, Alan & HUNTER, Martin., *supra* note (1), p. 160.

Therefore, the parties to the dispute will enter into a submission agreement to resolve their disputes by arbitration even if there is an arbitration clause.

Many countries, such as France and the Netherlands⁴ expressly adopt the arbitration clause inserted in the main contract which submits future disputes arising out of the execution of this contract to arbitration. The French Code of Civil Procedure, for instance, provides that:

“ An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.”⁵

However, in certain Central and Latin America countries, such as Honduras and Venezuela, the possibility of enforcement of the arbitration clauses, which refer future disputes to arbitration, remains in doubt.⁶

Moreover, the UNCITRAL Model Law of 1985 contains a provision which adopts an arbitration clause as a type of arbitration agreement. It states that:

“ An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”⁷

There are certain major matters which should be considered in an arbitration clause, such as the appointment of an arbitral tribunal, the place of arbitration and the applicable law of the contract as well as other minor matters.

It is desirable that an arbitration clause determines the place of arbitration, especially in *ad hoc* arbitration, and appoints the number of arbitrators and how they are chosen. In fact, wishes of the parties are the basic foundation in nominating an arbitral tribunal. Many national arbitration laws of different countries require that the number of an arbitral tribunal must be uneven. For example, the Netherlands

⁴ The Netherlands Arbitration Act of 1986, Art. 1020 (2).

⁵ The French Code of Civil Procedure of 1980, Art. 1442.

⁶ DAVID, René., *Arbitration in International Trade*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1985, p. 171.

⁷ The UNCITRAL Model Law of 1985, Art. 7 (1).

Arbitration Act of 1986 states that:

" The arbitral tribunal shall be composed of an uneven number of arbitrators. The arbitral tribunal may also consist of a sole arbitrator."⁸

3.1.2.1 Separability of the arbitration clause

The concept of the separability of the arbitration clause means that an arbitration clause is separate from the main contract of which it forms part. Such separability does not exist only when the main contract has terminated by performance but also when it has terminated prematurely by reason of *force majeure* or breach of the contract.

Indeed, there are two separate contracts. The first is the main contract that deals with the subjects between the parties. The second refers any dispute arising out of the main contract to arbitration.

Many civil law countries, such as the Netherlands explicitly adopt the concept of separability of the arbitration agreement, whether an arbitration clause or a submission agreement. Thus, the Netherlands Arbitration Act of 1986 provides that:

“ An arbitration agreement shall be considered and decided upon as a separate agreement.”⁹

As well, in France, arbitration clauses are not considered as separable from the main contracts, as a rule, in domestic arbitrations, but the contrary principle is admitted in international arbitration. By contrast, certain countries do not adopt the concept that an arbitration clause is separable from the main contract.¹⁰

In most common law countries, such as the United States, there are some presumptions and cases, such as the decision of the U.S. Supreme Court in the *Prima Paint v. Flood & Cocklin Case*, which affirm the rule that the arbitration clause is

⁸ The Netherlands Arbitration Act of 1986, Art. 1026 (1).

⁹ Ibid., Art. 1053.

¹⁰ DAVID, René., *supra* note (6), p. 193.

separable from the main contract in which it was inserted.¹¹

Further, the concept of the separability of arbitration clause is recognised by certain international rules of arbitration, such as the UNCITRAL Arbitration Rules which state:

" An arbitration clause that forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract."¹²

The question which may arise when the main contract is null and void is: does that mean that the arbitration clause is also invalid?

The invalidity of the arbitration clause depends on the reason for the main contract being found to be null and void. It is important to make a distinction between the nullity of a contract and its non-existence. If the contract is existent but it is invalid the arbitration clause will be valid in accordance with the separability of the arbitration clause. The SNE v. Joc Oil Case is a good example.¹³ Whereas, if the contract does not exist (because no contract was concluded or because force was used to induce the signatures or the person who signed was under some legal disability, such as being a minor) the arbitration clause will be null and void.¹⁴

3.1.3 The position in the Kingdom of Saudi Arabia

In general, the parties to contract can submit any existing and future disputes arising out of the execution of their contract to arbitration according to the Arbitration Regulation of 1983 which recognises the different types of arbitration

¹¹ Prima Paint Corp. v. Conklin Mfg. Co. , Supreme Court Reporter (USA), vol. 18 L, 2d Ed., 1967, pp. 1270-89.

¹² The UNCITRAL Arbitration Rules, Art. 21 (2).

¹³ Vsesojuznoje Objedinerije Sojuznefteexport (SNE) v. Joc Oil Ltd, vol. XV, The Yearbook Commercial Arbitration 1990, pp. 31 *et esq.*

¹⁴ For further details, REDFERN, Alan & HUNTER, Martin., *supra* note (1), p. 279.

agreement, particularly the submission agreement and the arbitration clause. This Regulation states that:

" The parties may agree to arbitrate a specific existing dispute; a prior agreement to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract."¹⁵

Moreover, the Implementation Rules of 1985 confirm such recognition where they provide that:

" An agreement to arbitrate may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract."¹⁶

In fact, this constitutes a significant improvement with respect to the previous position where the arbitration clause was unenforceable.¹⁷

This sub-section will deal with two main aspects which are the submission agreement and the arbitration clause as follows.

3.1.3.1 Submission agreement

The submission agreement must be in writing and in the Arabic language.¹⁸ However, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not require any specific form for a submission agreement.

The Regulation and its Implementation Rules require that the parties to the dispute have to respect certain formal constraints. For example, it is necessary to prepare an arbitration instrument when the parties to the dispute enter into a submission agreement to settle their disputes by arbitration. This arbitration instrument must be filed with the authority originally having jurisdiction over the

¹⁵ The Arbitration Regulation of 1983, Art. 1.

¹⁶ The Implementation Rules of 1985, Art. 6.

¹⁷ VAN DEN BERG, Albert Jan., *International Handbook on Commercial Arbitration, Saudi Arabia*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 6.

¹⁸ The Arbitration Regulation of 1983, Art. 5 and the Implementation Rules of 1985, Art. 25.

dispute which may be one of *the Sharīah* courts, the Board of Grievances, the Committee for the Settlement of Banking Disputes, the Committee for the Settlement of Labour Disputes, or any other judicial committee having competence to decide some cases.

According to Article 5 of the Arbitration Regulation of 1983, the arbitration instrument must contain the following requirements:

- It should bear the signatures of the parties to the dispute or their official representatives.
- It should bear the signature of the arbitrator, or the signatures of the arbitrators if more than one.
- It should specify the subject-matter of the dispute.
- It should indicate the names of the parties to the dispute.
- It should indicate the names of the arbitrators and their acceptance to consider the dispute.
- It should enclose copies of the documents relevant to the dispute.¹⁹

Moreover, it is important that the arbitration instrument contains certain provisions which determine and regulate the place of arbitration inside the Kingdom of Saudi Arabia, such as Riyadh, Jeddah, *al-Dammām*, or any other Saudi city and the other matters relating to the arbitral process. In practice, the parties to the dispute usually choose one of the Saudi Chambers of Commerce and Industry as a place of arbitration.

It is necessary that the arbitration instrument is filed with the authority originally having jurisdiction over the dispute after this instrument fulfils all the conditions required in the Arbitration Regulation of 1983 and its Implementation Rules of 1985. The competent authority records and approves the arbitration instrument within fifteen days from the registration at the request of the parties to the dispute by the clerk of such authority.²⁰

However, neither the Arbitration Regulation nor its Implementation Rules

¹⁹ AL-GHANY, Eid M., *The Booklet for the Explanation of Saudi Arbitration Rules*, 1st Ed., Riyadh, The Kingdom of Saudi Arabia, 1984, p. 22.

²⁰ The Implementation Rules of 1985, Art. 7.

provide for the consequences if the competent authority fails to approve the submission agreement within such time limits. In this case, arbitration as a means of settling disputes may lose one of the most important advantages which relates to saving time of the parties to the dispute.

It seems that this gap in the Regulation and its Implementation Rules is not serious because although the competent judicial authorities have a large number of cases and they may not be able to hear these cases before three or four months from the date of the lodging of an appropriate petition. These authorities in practice approve submission agreements within legal time limits or within reasonable time limits which do not exceed thirty days from the presentation of the submission agreement to them.

However, it would be better that the Saudi legislator fills this gap by revising and amending the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

3.1.3.2 Arbitration clause

The position of the Saudi statutes from the validity of the arbitration clause can be set forth as follows:

- Before the issue of the Arbitration Regulation of 1983.
- After the issue of the Arbitration Regulation of 1983.

3.1.3.2[i] Before the issue of the Arbitration Regulation of 1983

The concept of an arbitration clause was unknown in the Saudi legal regulations which contain provisions governing arbitration, such as the Commercial Court Regulation of 1931, the Labour and Workmen Regulation of 1969, and the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981.

However, although arbitration clauses, other than those of the ICSID type, were not sanctioned in Saudi statutes, it was common practice in contracts to include

arbitration clauses.²¹

Certain legal writers think that the arbitration clauses inserted in internal commercial contracts are generally legal but not binding on the judicial and enforcement authorities which may either take jurisdiction, in spite of the existence of a valid arbitration clause binding the parties, or request the parties to resolve their disputes by arbitration.²²

Moreover, the clauses inserted in international commercial contracts which refer any dispute arising out of the performance of these contracts to arbitration were not binding on the judicial authorities. These authorities had the power to accept or refuse the enforcement of the arbitral awards issued in the disputes arising from these contracts.

The concession contracts regarding the extraction, refining, marketing and transport of oil which were concluded between the Saudi Government and foreign oil companies, contained clauses submitting any dispute arising out of these contracts to arbitration. It seems that the Saudi Government used to enforce the arbitral awards issued in the disputes arising out of these contracts. The Arbitral Award issued in Aramco Case is a good example.

3.1.3.2[ii] After the issue of the Arbitration Regulation of 1983

The position of the Saudi legislator has drastically changed since the issue of the Arbitration Regulation of 1983. The most important characteristic of this Regulation has been the recognition of the validity of an arbitration clause in the Saudi legal system.²³

An arbitration clause should include provisions regulating the basic matters of

²¹ SALEH, Samir., *Commercial Arbitration in the Arab Middle East*, London, Graham & Trotman, 1984, p. 304.

²² LERRICK, A. & MIAN, Q. J., *Saudi Business and Labour Law*, London, Graham & Trotman, 1982, p. 192; also MOORE, Michael T. & LOTT, Lesile J., *Arbitration under the Saudi Legal System*, February 1981, vol. 4, no. 2, Middle East executive Reports, p. 12.

²³ The Arbitration Regulation of 1983, Art. 1.

the arbitral process, such as the number of arbitrators and how they are appointed, which Saudi city will be the place of arbitration, the time limits within which an arbitral award should be rendered and so on.

Arbitration clauses inserted in contracts which are executed inside the Kingdom of Saudi Arabia, should be in writing, in Arabic, and should be signed by the parties with two witnesses acting for each signatory.²⁴

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are unclear whether arbitration clauses validate and bind the parties without the need to prepare new arbitration instruments which must be filed and approved by the authority originally having jurisdiction over the dispute.

In practice, it is necessary to prepare an arbitration instrument in the case of the existence of an arbitration clause submitting the disputes to arbitration. The arbitration instrument must be filed and approved by the authority originally having jurisdiction over the dispute before the commencement of the arbitration proceedings. However, one legal writer thinks that the preparation of an arbitration instrument and the approval of the competent authority is only required if one of the parties to the dispute does not comply with the arbitration clause in order to proceed with the arbitration by the nomination of the arbitrator of the defaulting party.²⁵

Legal writers have reached different conclusions concerning the necessity of the filing of the arbitration clauses the competent authority. Many legal writers deem that arbitration stemming from a prior arbitration clause is not subject to filing with the competent authority because the texts of certain articles of the Arbitration Regulation of 1983 recognise that arbitration clauses have existence and legal effects without the need for the preparation of an arbitration instrument and the approval of the competent judicial authorities.²⁶

There are a number of articles of the Arbitration Regulation of 1983 which support this opinion. For example, Article 7 of the Regulation puts the arbitration

²⁴ SALEH, Samir., *supra* note (21), p. 306.

²⁵ EL-AHDAB, Abdul Hamid., *Commercial Arbitration with the Arab Countries*, London, Graham & Trotman, 1990, pp. 609-610.

²⁶ *Ibid.*, pp. 608-10; also VAN DEN BERG, Albert Jan., *supra* note (17), pp. 6-7.

clause and the decision confirming the submission agreement as to a dispute already arisen on the same level. It provides that:

" If the parties have agreed to arbitrate before the occurrence of the dispute (i.e. , the arbitration clause), or if the arbitration instrument relating to a specific existing dispute (i.e. , the submission agreement) has been approved, then the subject-matter of the dispute shall be heard only according to the provisions of this Regulation."

The alternative wording (**or**) suggests that no arbitration instrument is required in the case of an arbitration clause. Thus the Regulation recognises and acknowledges arbitration clauses and released them from formal constraints which submission agreements must respect and comply with.

Moreover, Article 12 of the Regulation promotes such view where it states that:

" The request for challenge shall be submitted to the Authority originally competent to hear the dispute within 5 days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred."

This Article governs arbitration stemming from an arbitration clause because the other type of the arbitration agreement (a submission agreement) must contain the names and signatures of the arbitrators when it is submitted to the authority originally having jurisdiction over the dispute for its approval. Consequently, the arbitrators in an arbitration stemming from a submission agreement are not subject to the challenge within five days from the day of the notification of the appointment of the arbitrators since the parties to the dispute agree upon these arbitrators before referring the submission agreement to the competent authority. On the other hand, in arbitration stemming from an arbitration clause, each party notifies the other of the appointment of an arbitrator.

Indeed, if every arbitration had to be ratified by the authority originally having jurisdiction over the dispute, what would be the meaning of the text that the challenge must be made within five days following the date at which the other party

is notified of the appointment of the arbitrator?²⁷

In addition, Article 10 of the Regulation grants the authority originally having jurisdiction over the dispute the power to appoint the missing arbitrator only if one of the parties to the dispute refuses or fails to participate in the arbitration stemming from an arbitration clause as a submission agreement, which must be filed by the competent authority, must contain the names of the arbitrators.

On the other hand, one legal writer thinks that an arbitration clause alone, without the prior filing and approval of an arbitration instrument by the authority originally having jurisdiction over the dispute, is insufficient to commence the arbitration proceedings in spite of the fact that the Arbitration Regulation of 1983 recognises arbitration clauses. If so, the arbitration clause has lost its main advantage.²⁸

In fact, it seems that the formal constraints existing in the Arbitration Regulation of 1983 are not applied to the arbitration clause, particularly the preparation of an arbitration instrument which must be filed and approved by the authority originally having jurisdiction over the dispute and there are presumptions supporting and confirming this opinion, such as the texts of certain articles of the Arbitration Regulation of 1983, especially Articles 7, 10 and 12 of the Regulation which were explained above.

It seems that although the Saudi legislator has recognised the concept of the validity of an arbitration clause, which prevails in most of the modern international legal systems without needing to comply with any formal constraint, the practical reality in the Kingdom of Saudi Arabia still requires that the parties to the dispute should comply with certain formal constraints, such as the preparation of an arbitration instrument when they decide to submit their dispute to arbitration.

It is important to modify this position, particularly when the arbitration clause regulates all major matters required for the commencement of the arbitral process, such as the composition of the arbitral tribunal, the applicable law, the kinds of disputes which may be referred to arbitration, the place and language of arbitration,

²⁷ EL-AHDAB, Abdul Hamid., *supra* note (25), p. 609.

²⁸ SALEH, Samir., *supra* note (21), p. 305.

the issue and enforcement of the arbitral award and the other arbitration proceedings.

It is desirable that the Saudi legislator revises and reviews the terminology of the Arbitration Regulation of 1983 and its Implementation Rules of 1985 because there is inconsistency in their terminology. It would have been preferable if it had used the general term "arbitration agreement" throughout the Regulation and its Rules, and the specific terms "arbitration clause" and "submission agreement" where a different treatment of these two categories is desired.²⁹

Thus, the Ministry of Commerce had taken the position that clauses inserted in contracts for work in the Kingdom of Saudi Arabia specifying arbitration outside of the Kingdom of Saudi Arabia are null and void.³⁰ In recent years, however, the Ministry of Commerce has changed its policy with respect to these clauses and made it less restrictive, particularly when Saudi law is the applicable law. The competent authority, which is the Board of Grievances, will consider the arbitral awards made according to these clauses as foreign awards.³¹

3.1.3.2[iii] Separability of the arbitration clause

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent with regard to the question of the separability of the arbitration clause. It would be better if the Saudi legislator inserts provisions confirming the separability of the arbitration clause from the main contract, or if the parties write and sign the clause itself submitting to arbitration in a separate sheet and annex it to the main contract.

There is no specific form required for an arbitration clause in a contract by the Arbitration Regulation of 1983. However, in 1986, the Saudi Arabian Monetary Agency (SAMA), the Central Bank, distributed two forms of arbitration clauses

²⁹ VAN DEN BERG, Albert Jan., *supra* note (17), p. 7.

³⁰ McQUAID, Richard F., *Foreign Arbitral Awards: Can They Be Enforced?*, May 1979, vol. 2, no. 5, Middle East Executive Reports, p. 2.

³¹ See above, p. 72.

presumably intended for inclusion in bank credit agreements.³² The principle of mandatory arbitration in banking disputes has not been officially adopted by the Saudi regulations governing the banking matters. However, the Saudi Arabian Monetary Agency (SAMA) prefers that the parties to banking contracts insert clauses submitting any dispute arising out of these contracts to conciliation and arbitration.

Two legal writers analysed the crucial features of arbitration clauses inserted in articles of association of Saudi limited liability companies which were published in *'Um al-Ḳurā*, the Official Gazette, from 1970 to 1980. They only focused on the place of arbitration and the applicable law to the disputes because the majority of arbitration clauses provided for the composition of an arbitral tribunal from three arbitrators, of whom two are chosen by the parties to the dispute, and the third by the two arbitrators.³³

The conclusion of study was that there were no significant differences between arbitration clauses found in articles of association of companies of one hundred percent Saudi equity participation and those of companies formed with mixed Saudi and foreign capital. However, mixed companies tended to provide for arbitration in their articles of association more than purely Saudi companies.³⁴

It would be better that the arbitration clause contains the following aspects for settling the disputes where arbitration takes place inside the Kingdom of Saudi Arabia:

- Any dispute or controversy arising out of the contract shall be finally resolved by arbitration in accordance with the Arbitration Regulation of 1983 and its Implementation Rules of 1985.
- The arbitration clause shall be considered as an agreement independent of the other terms of this contract.
- Each party shall appoint one arbitrator and the two arbitrators so nominated shall appoint a third arbitrator who shall act as the chairman of

³² GRENLEY, Neal F., *Saudi Arabia*, Winter 1987, vol. 21, no. 1, The International Lawyer, p. 249.

³³ LERRICK, A. & MIAN, Q. J., *supra* note (22), pp. 199-216.

³⁴ *Ibid.*, p. 199.

the arbitral tribunal.

- If either party fails to appoint an arbitrator within fifteen days of receiving request of the appointment of one arbitrator by the other party, or if the two arbitrators are unable to agree upon a third arbitrator within fifteen days of the nomination of the second arbitrator, either party may request the authority originally having jurisdiction over the dispute, such as the Board of Grievances to make the necessary appointment. The same method shall apply to the replacement of an arbitrator.
- Arbitration shall be held in Riyadh or in any Saudi city which has a Chamber of Commerce and Industry.
- The procedure shall be determined by the parties or by the arbitral tribunal if the parties are unable to agree upon specific procedure.
- The arbitral award shall be rendered within sixty days from the date of the first session to hear the dispute.
- The arbitral tribunal shall fix the fees and expenses of the arbitral process in the arbitral award. Both parties to this contract shall be equally responsible for these fees and expenses unless the arbitral tribunal finds it justified to apportion them in another method between the parties.

3.2 Provisions as to the validity of the arbitration agreement

There are certain provisions which are necessary as to the validity of the arbitration agreement. These provisions are as follows:

- Agreement in writing.
- Capacity of the parties.
- Arbitrability.

3.2.1 Agreement in writing

There are some questions arise with respect to the provision of agreement in writing, such as the position of the national arbitration laws of different countries, and international and institutional rules of arbitration from modern systems of communication, such as telex and fax, oral arbitration agreement between the parties to the dispute, and the importance of the signature of the parties.

This sub-section is an attempt to answer these questions and to set forth the position of the national arbitration laws of different countries, and international and institutional rules of arbitration concerning these aspects.

Many countries, such as Belgium and France³⁵ require that an arbitration agreement should be in writing. For example, the Belgian Judicial Code states that:

“ An arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration.”³⁶

Many International and institutional rules of arbitration, such as the UNCITRAL Model Law of 1985 require that arbitration agreements should be in

³⁵ The French Code of Civil Procedure, Art. 1449.

³⁶ The Belgian Judicial Code, Art. 1677.

writing.³⁷ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, for instance, defines the term "agreement in writing" in one of its articles as follows:

" It shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."³⁸

The question which may arise is whether or not the modern systems of communication, such as telex are considered as one of forms of writing.

Many countries, like France and the Netherlands are silent in respect of this question. However, certain countries, namely Switzerland explicitly adopt the validity of the arbitration agreement made by one of the modern means of communication, such as a telex. The Swiss Private International Law Act of 1987 explicitly provides that:

" An agreement to be made in writing or by means of communication, such as a telex that allows it to be evidenced by a text."³⁹

Certain international rules of arbitration consider these means of communication as a form of writing. For example, the UNCITRAL Model Law of 1985 expressly provides that:

" The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another."⁴⁰

The question which may also arise is whether an oral arbitration agreement is sufficient to start the arbitral process or not.

³⁷ The UNCITRAL Model Law of 1985, Art. 7 (2).

³⁸ The New York Convention of 1958, Art. II (2).

³⁹ The Swiss Private International Law Act of 1987, Art. 178.

⁴⁰ The UNCITRAL Model Law of 1985, Art. 7 (2).

In practice, it is unlikely that an arbitration agreement will be made orally. It is difficult to prove the existence of an arbitration agreement when it is involved orally or on the telephone, especially if one of the parties to the dispute denies it. Nevertheless, there are some methods which may be used to prove oral arbitration agreements. For example, when the respondent admits the existence of an oral arbitration agreement before the competent court or when certain persons, who are normally two, witness that there is an oral arbitration agreement between the parties to the dispute.⁴¹

It seems that presumptions may confirm recourse by the parties to arbitration, such as when the parties to the dispute have resorted to arbitration to resolve the disputes arising out of their commercial contracts during their long dealing over many years. Accordingly, it can be concluded that the parties prefer to settle all the disputes arising from their commercial contracts by arbitration.

In some countries, like England, it is possible to make an oral arbitration agreement where the judge of the competent court decides whether an oral arbitration agreement is or not existent on the basis of the statements of the parties to the dispute.⁴²

In addition, the new English Arbitration Act of 1996 explicitly states that if one party applies to submit the dispute to arbitration on the basis of the existence of an arbitration agreement and the other party does not deny it, the arbitration will be valid.⁴³

The question, whether the signatures of the parties are necessary or not, arises from time to time, particularly Article II (2) of the New York Convention of 1958 "an arbitral clause in a contract or an arbitration agreement, signed by the parties" causes an ambiguity whether the contract or the arbitration agreement itself should be signed. The modern tendency in international commercial arbitration does not insist

⁴¹ This information was given on the basis of a personal communication with my supervisor Professor John MURRAY.

⁴² The International Chamber of Commerce., *Arbitration Law in Europe; in England and Wales by Andrew MARTIN*, Paris, ICC Services Publishing, 1981, p. 164.

⁴³ The new English Arbitration Act of 1996, Sec. 5 (5).

upon the signature of the arbitration agreement by the parties to the dispute.⁴⁴ Moreover, the new English Arbitration Act of 1996 does not require that the arbitration agreement must be signed by the parties to the dispute. It explicitly states that:

“ There is an agreement in writing-
(a)- If the agreement is made in writing (whether or not it is signed by the parties).”⁴⁵

3.2.2 Capacity of the parties

The parties to a contract or an agreement, such as an arbitration agreement must have full legal capacity when they decide to enter into this contract or agreement. If one of the parties to the dispute is under some incapacity, an arbitration agreement will be invalid. The New York Convention of 1958 states that:

" The recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under incapacity." ⁴⁶

3.2.2.1 Capacity of private parties

The capacity of a natural person may depend on a number of connecting factors, such as his nationality or on his place of usual residence. Moreover, the capacity of a legal person may depend on the place of incorporation or the place of business.⁴⁷

In domestic arbitration, the law governing the capacity of a natural person to conclude an arbitration agreement, is usually the national law of his country, whereas

⁴⁴ REDFERN, Alan & HUNTER, Martin., supra note (1), p. 135.

⁴⁵ The new English Arbitration Act of 1996, Sec. 5 (2).

⁴⁶ The New York Convention of 1958, Art. V. 1 (a).

⁴⁷ REDFERN, Alan & HUNTER, Martin., supra note (1), p. 147.

in international commercial arbitration, the law governing the capacity of the parties to the dispute, who wish to enter into an arbitration agreement, may be the law of the place where the arbitration agreement is entered into rather than the law of the place of residence of natural person. In this case, however, an arbitral award may not be enforced in the country where the losing party resides, if the law of this country considers that the loser is under incapacity.

3.2.2.2 Capacity of the State and its Agencies

Countries differ regard to the question of the capacity of the state and its agencies to enter into an arbitration agreement.⁴⁸ Many countries, such as most common law countries (England and the United States), some Latin America countries (Bolivia and Chile) and some civil law countries (Germany and Switzerland) do not impose any restriction on the capacity of the state and its agencies to submit their disputes to arbitration.

Moreover, in some other countries, such as Ecuador and Peru, there are some restrictions in respect of the capacity of the state and its agencies to resort to the arbitration as a means of resolving disputes. For example, the state and its agencies are allowed to submit their disputes to arbitration, provided that the arbitration is held within the territory of this state and not abroad.

Other countries, such as Belgium and Argentina still prohibit or impose strict restrictions on the capacity of the state and its agencies to submit disputes to arbitration.⁴⁹

The question that may arise: what are the reasons for these restrictions?

There are legal, economical and political considerations. However, it is difficult to give a clear answer to this question since each country has particular reasons.

⁴⁸ For further details, DAVID, René., *supra* note (6), pp. 176-82.

⁴⁹ *Ibid.*, p. 177.

3.2.3 Arbitrability

In general, many countries, like France consider that disputes arising out of commercial contracts, whether existing or future disputes are to be regarded as capable of settlement by arbitration.⁵⁰

Countries differ with respect to whether the disputes arising in the field of civil, labour, personal status laws, are to be settled by arbitration or should be referred to the courts. In fact, the need for vigilance concerning some kinds of disputes is important because certain countries consider these disputes as disputes incapable of settlement by arbitration whereas others take an opposite position. For example, in Italy, disputes relating to employment may not be resolved by arbitration.⁵¹ In France, only existing disputes arising from civil contracts can be submitted to arbitration, in contrast with future disputes which arise out of the civil contracts.⁵²

Many national arbitration laws of different countries exclude the possibility of arbitration in all matters where public policy is concerned. Public policy usually differs from one country to another and from time to time. Consequently, the prohibition of the settlement of a specific dispute by arbitration, because it is contrary to public policy, may be abrogated in future when public policy changes with respect to this dispute.

The most important types of disputes that countries may not consider as capable of settlement by arbitration are disputes regarding security laws, bankruptcy, nationality laws and disputes arising out of some matters of a public law nature, such as criminal law.

International conventions governing arbitration as a method of resolving disputes do not specify the matters which may be submitted to arbitration. They leave

⁵⁰ Ibid., p. 186.

⁵¹ REDFERN, Alan & HUNTER, Martin., supra note (1), p. 147.

⁵² For further details, DAVID, René., supra note (6), pp. 186-87; also WEST, Andrew., DESDEVISES, Yvon., FENET, Alain., GAURIER, Dominique & HEUSSAFF, Marie-Clet., *The French Legal System; An introduction*, London, Fourmat Publishing, 1992, pp. 312-13.

the last wording in this connection to the countries. Accordingly, a state may refuse to recognise and enforce an arbitral award, if the subject-matter of the dispute is incapable of settlement by arbitration under the law of this state. The New York Convention of 1958 confirms such rule where it states that:

" Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that:

- (a)- The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b)- The recognition or enforcement of the award would be contrary to the public policy of that country."⁵³

3.2.4 The position in the Kingdom of Saudi Arabia

3.2.4.1 Agreement in writing

Although the Arbitration Regulation of 1983 does not expressly state that an arbitration agreement should be in writing, it implicitly requires that an arbitration agreement should be in writing because according to this Regulation, it is necessary that any submission agreement contains the names and signatures of the parties and arbitrators and the subject-matter of the dispute and the approval of the authority originally having jurisdiction over the dispute. The Arbitration Regulation of 1983 states that:

" The parties to the dispute shall file the arbitration instrument with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorised attorneys, and by the arbitrators, and it must state the subject-matter of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached."⁵⁴

⁵³ The New York Convention of 1958, Art. V (2).

⁵⁴ The Arbitration Regulation of 1983, Art. 5.

The Regulation is silent in respect of the possibility of concluding of an arbitration agreement by one of the modern means of communication. However, it seems that an arbitration agreement made by one of these modern means of communication, such as fax and telex, may be proved by all possible methods when the other party does not participate in the arbitral process.

On the other hand, it is very difficult to start arbitration on the basis of an oral arbitration agreement, particularly as the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not contain any provision permitting oral arbitration agreements. However, oral arbitration agreements can be proved by all possible means, such as witnesses.⁵⁵

In practice, there is not as yet any dispute submitted to arbitration on the basis of the existence of an arbitration agreement concluded by one of the modern means of communication, such as fax or on the basis of the existence of an oral arbitration agreement.

It would be better if the Saudi legislator sets forth his position in respect to the validity of arbitration agreements concluded by one of the modern means of communication or orally, especially the importance of modern means of communication is increasing rapidly in the commercial sphere.

In addition, the Arbitration Regulation of 1983 requires that arbitration instruments should be signed by the parties to the dispute. Article 5 of the Regulation provides that: " The instrument shall be signed by the parties." Consequently, it is necessary that the arbitration instrument contains all the formal constraints required by the Regulation and its Implementation Rules, such as the signature of the parties to the dispute.

⁵⁵ NADER, M. J., *Conciliation and Arbitration in Saudi Arabia under the Chambers of Commerce and Industry*, Jeddah, The Kingdom of Saudi Arabia, Sahar Printing Press, Undated. p. 14.

3.2.4.2 *Capacity of the parties*

3.2.4.2[i] Capacity of private parties

Any natural or legal person, whether Saudi or foreign, having full legal capacity according to *the Shari'ah* can enter into an arbitration agreement. The Arbitration Regulation of 1983 states that:

" An agreement to arbitrate may not be made except by those who have capacity to act."⁵⁶

Moreover, the Implementation Rules of 1985 confirm that where they provide that:

" The agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorised to do so by the competent court."⁵⁷

One legal writer thinks that a bankrupt person is unable to enter into an arbitration agreement.⁵⁸ In fact it seems that the practical reality upholds this view.

3.2.4.2[ii] Capacity of the State and its Agencies

The capacity of the Saudi Government and its Agencies to submit disputes to arbitration has already been discussed.⁵⁹ After the Aramco Case, the Council of Ministers issued in 1963 its Resolution No. 58 which prohibited the Saudi Government and its Agencies from entering into contracts with third parties, if these

⁵⁶ The Arbitration Regulation of 1983, Art. 2.

⁵⁷ The Implementation Rules of 1985, Art. 2.

⁵⁸ EL-AHDAB, Abdul Hamid., *supra* note (2), p. 41.

⁵⁹ See above, Chapter two, pp. 59 *et seq.*

contracts contain clauses referring any dispute to arbitration. However, as a result of the increasing importance of international commercial arbitration, the Kingdom of Saudi Arabia ratified certain international conventions regarding arbitration as a means of resolving disputes. For example, it ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 in 1980 and also the New York Convention of 1958 in 1994. Consequently, the scope of the prohibition has been progressively reduced.

The Arbitration Regulation of 1983 affirms the principle of prohibition, but it grants the President of the Council of Ministers the right to permit the Government or one of its Agencies to settle a dispute by arbitration. The Regulation provides that:

" Government Agencies are not allowed to resort to arbitration for the settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This provision may however be amended by resolution of the Council of Ministers."⁶⁰

According to this Article, it can be concluded that the Saudi legislator aims to reduce the scope of the prohibition because he grants the Council of Ministers the power to amend this position without the need for the approval of the King.⁶¹

Moreover, the Implementation Rules of 1985 reaffirm such position and provide some necessary details when a governmental agency wishes to refer its disputes arising out of a specific contract to arbitration as follows:

" In disputes where a Government Authority is party with others and decides to arbitrate, such Authority shall prepare a memorandum with respect to arbitration in the dispute, stating the subject-matter, the reasons for arbitration and the names of the parties to be submitted to the Council of Ministers for the approval of the arbitration. The President of the Council of Ministers may, by a prior resolution, authorise a Government Authority to settle disputes arising from a particular contract, through arbitration. In all cases, the Council of Ministers shall be notified of the arbitration awards adopted."⁶²

⁶⁰ The Arbitration Regulation of 1983, Art. 3.

⁶¹ JORDAN, Richard D., *Saudi Arabia; Arbitration rules introduced*, November 1983. International Financial Law Review, p. 43.

⁶² The Implementation Rules of 1985, Art. 8.

It is unclear whether the approval of the President of the Council of Ministers is required before entering into a contract which contains an arbitration clause or when the dispute arises out of the performance of this contract.⁶³ When the Saudi Government or one of its Agencies decides to resort to arbitration, whether by an arbitration clause or a submission agreement, it should prepare and refer a request to the President of the Council of Ministers for his permission.

3.2.4.3 *Arbitrability*

In fact, all disputes on any matter of law may be submitted to arbitration except matters which cannot be so resolved by a settlement,⁶⁴ such as divorce for adultery by woman, crimes and any other matter regarding public policy. Consequently, arbitration is not admissible for disputes concerning the rights of the status of a person, except disputes concerning the financial consequences of these rights. Moreover, it is not valid to decide through arbitration the validity of a marriage contract, or whether a certain person is eligible for an inheritance or on a dispute relating to the guardianship of an infant.⁶⁵

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not distinguish between civil matters and commercial matters.⁶⁶ Thus, disputes arising out of these matters may be settled by arbitration. The Arbitration Regulation of 1983 provides that:

"Arbitration shall not be permitted in cases where a settlement is not

⁶³ TURCK, Nancy B., *Dispute Resolution in Saudi Arabia*, Summer 1988, vol. 22, no. 2. The International Lawyer, p. 432.

⁶⁴ The Arbitration Regulation of 1983, Art. 2.

⁶⁵ AL-GHANY, Eid M., *supra* note (19), p. 13.

⁶⁶ In the Kingdom of Saudi Arabia, the law governing civil matters is *the Sharī'ah*, whereas commercial matters are governed by several state regulations, such as the Commercial Court Regulation of 1931, the Commercial Agencies Regulation of 1962 and the Companies Regulation of 1965. As well, civil cases are brought before *the Sharī'ah* Courts whereas commercial cases are decided before the Commercial Circuits of the Board of Grievances, the Commercial Papers Committee, and the Committee for the Settlement of Banking Disputes in accordance with the nature of the commercial dispute.

allowed."⁶⁷

Its Implementation Rules of 1985 confirm this text where they state that:

" Arbitration in matters wherein conciliation is not permitted, such as *Hudūd*⁶⁸ and *Li'ān* between spouses (conjugal anathema), and all matters relating to the public order, shall not be accepted."⁶⁹

In practice, there are a number of civil cases which were decided by arbitration, such as A. CO. Dev. (Construction company) v. Mr. S. A. H. (Saudi natural person) case and also S. E. CO. Ltd (Construction company) v. Mr. F. A. N. (Saudi natural person) case.⁷⁰

On the other hand, arbitration is not allowed in respect of the disputes arising from the contracts which deal with usury (interests) or gambling because these contracts are contrary to *the Sharī'ah* principles, which is the supreme law in the Kingdom of Saudi Arabia, and to the Saudi public policy which is derived from *the Sharī'ah*.

As a result of specific provisions or some administrative practices, it is also not possible to submit to arbitration the disputes arising out of the following matters⁷¹

3.2.4.3[i] Disputes amongst partners of a company or between a company and its partners

In 1980, the Ministry of Commerce issued a Ministerial Memorandum in which it requested the Department of the Commercial Register not to register any company whose statutes and articles of association contain an arbitration clause

⁶⁷ The Arbitration Regulation of 1983, Art. 2.

⁶⁸ *Hudūd* are the crimes which *the Qur'ān* specified their punishments, such as the amputation of the hand in the crime of theft.

⁶⁹ The Implementation Rules of 1985, Art. 1.

⁷⁰ The Arbitral Award issued on 27/05/1414 A.H. (1994 A.D.); see also the Arbitral Award No. 5/1407, dated 19/09/1407 A.H (1987 A.D.).

⁷¹ For details, EL-AHDAB, Abdul Hamid., *supra* note (2), pp. 40-41.

which may submit to arbitration outside the Kingdom of Saudi Arabia any dispute amongst the partners or between them and their company, unless the Ministry of Commerce issues an authorisation in that respect. In fact, the Ministry of Commerce usually grants these exceptions easily when the partners of the company are foreigners, but it is very reluctant when the partners are Saudis.

3.2.4.3[ii] Disputes regarding commercial agencies contracts

Commercial agency contracts have been regulated in the Kingdom of Saudi Arabia in order to insure legal protection for the Saudi commercial agents. Consequently, the Saudi Commercial Agencies Regulation of 1962 requires some formalities, such as the contract must be registered with the Department of the Commercial Register.⁷² The Ministry of Commerce issued the Implementation Rules of this Regulation in 1981.⁷³ These Rules determine the contents of a commercial agency contract. They do not prohibit the parties from inserting a clause submitting their disputes to arbitration and they also do not forbid the Department of Commercial Register from registering a contract containing an arbitration clause. In practice, however, the Ministry of Commerce has prepared a standard form of commercial agency contract containing an article which provides that "any dispute must be brought before the Commission for the Settlement of Commercial Disputes".⁷⁴

The Department of Commercial Register has adopted this standard form and therefore, has refused to register any commercial agency contract which does not conform to this standard form. However, the Ministry of Commerce is planning to allow the registration of commercial agency contracts containing clauses which

⁷² The Commercial Agencies Regulation issued by the Royal Decree No. M/11, dated 20/02/1382 A.H. (1962 A.D.).

⁷³ The Implementation Rules were published in *'Um al-Kurā*, the Official Gazette, on 24/05/1401 A.H. (1981 A.D.) under the Resolution No. 1897.

⁷⁴ The competence of this Commission has been submitted to the Board of Grievances since 1987. See above, Chapter one, p. 30.

provide for an arbitration taking place outside the Kingdom of Saudi Arabia.⁷⁵

3.2.4.3[iii] Disputes between a foreign contractor and its Saudi agent

The Regulation on the Relations between a Foreign Contractor and its Saudi Agent of 1978 stipulates that any foreign company contracting with the Saudi Government which does not have a Saudi partner must have a Saudi services agent.⁷⁶ This Regulation states that the Commission for the Settlement of Commercial Disputes has jurisdiction over any dispute which might arise between a foreign contractor and its Saudi services agent.⁷⁷

In practice, the Ministry of Commerce refuses to accept the registration of a services agency contract concluded between a foreign contractor and its Saudi agent if it contains a clause providing for arbitration outside the Kingdom of Saudi Arabia.⁷⁸ Accordingly, the refusal of the registration of services agency contract will lead to prevent a foreign contractor, which does not have a Saudi partner, to work with the Saudi Government.

A foreign arbitral award made according to an arbitration clause inserted in a services agency contract concluded before the publication of the said Regulation will be valid.

⁷⁵ BOSHOF, L. L., *Saudi Arabia: Arbitration Vs Litigation*, 1986, Arab Law Quarterly, p. 305.

⁷⁶ The Royal Decree No. 2, dated 21/01/1398 A.H.(1978 A.D.).

⁷⁷ See above, note (74).

⁷⁸ SALEH, Samir., *supra* note (21), p. 302.

3.3 Effects of the arbitration agreement

Where there is a valid arbitration agreement, whether a submission agreement or an arbitration clause, the court will refuse to exercise jurisdiction. In such a case, it will stay judicial proceedings so that the matter may go to arbitration. However, in a few States in the United States which recognise only agreement to arbitrate existing disputes, either of the parties to the dispute may revoke the arbitration agreement at any time before the issue of the award and bring the case before the court.⁷⁹

Moreover, in many countries, such as Belgium, the competent authority stays the proceedings at the request of one of the parties to the dispute. For example, the Belgian Judicial Code provides that:

“ The judge seized of a dispute which is the subject of an arbitration agreement shall, at the request of either party, declare that he has no jurisdiction, unless, insofar as concerns the dispute, the agreement is not valid or has terminated, this exception must be proposed *in limine litis*.”⁸⁰

In Yemen, the competent authority, such as the court must refer the parties to arbitration, when there is an arbitration agreement except in the following two cases:

- If the court notes that the arbitration agreement is expired, ineffective or does not cover the dispute referred to it.
- If the parties to the dispute agree to continue the judicial proceedings before the court, then the arbitration agreement is held to be non-existent.⁸¹

In addition, in many countries, such as Egypt, the party to dispute who wishes to resort to arbitration, must invoke the arbitration agreement for a stay of court proceedings before taking any other steps in these proceedings, or he will lose his right to stay court proceedings on the basis of the existence of an arbitration

⁷⁹ HOLTZMANN, Howard., *International Handbook on Commercial Arbitration, The United States*, Deventer, The Netherlands, Kluwer Law & Taxation, 1984, p. 12.

⁸⁰ The Belgian Judicial Code, Art. 1679 (1).

⁸¹ The new Yemeni Arbitration Act of 1992, Art. 19.

agreement.⁸² Whereas in certain other countries, the court, on its own motion, has the right to raise the arbitration agreement at any stage of the proceedings.⁸³

Certain international and institutional rules of arbitration, such as the ICC Arbitration Rules expressly state that the arbitration will proceed, even if one of the parties refuses or fails to take part in it, provided there is an arbitration agreement containing the wishes of the parties to submit the dispute to arbitration by the International Chamber of Commerce.⁸⁴

Also, the UNCITRAL Model Law of 1985 provides that the competent authority, such as the court, should refer the dispute, at the request of either party not later than when he submits his first written statement, to arbitration, when there is an arbitration agreement unless this agreement is null and void.⁸⁵

3.3.1 The position in the Kingdom of Saudi Arabia

3.3.1.1 *Before the issue of the Arbitration Regulation of 1983*

An arbitration agreement was not binding except in the ICSID arbitration. *The Shari'ah* Courts and the other specialist judicial commissions were not obliged to stay the court proceedings and to refer the parties to the dispute to arbitration on the basis of the existence of an arbitration agreement. Accordingly, if one of the parties to the dispute refused to respect the arbitration clause inserted in the contract and instead of that he insisted on submitting the dispute to the court, the court would comply with his request to hear and decide the case.⁸⁶

⁸² EL-AHDAB, Abdul Hamid., *The New Egyptian Arbitration Act in Civil and Commercial Matters.* , June 1995, vol. 12, no. 2, Journal of International Arbitration, p. 75.

⁸³ EL-AHDAB, Abdul Hamid., *supra* note (25), p. 612; also VAN DEN BERG, Albert Jan., *supra* note (17), p. 14.

⁸⁴ The ICC Arbitration Rules, Art. 8 (2).

⁸⁵ The UNCITRAL Model Law of 1985, Art. 8 (1).

⁸⁶ HEJAILAN, Salah., *National Reports; Saudi Arabia*, 1979, vol. IV, The Yearbook of

3.3.1.2 After the issue of the Arbitration Regulation of 1983

One of the major effect of the Arbitration Regulation of 1983 is that a dispute brought before the court must be submitted to arbitration when there is an arbitration agreement between the parties. In fact, this is an important step forward to the development of arbitration and the acknowledgement of its role in the Kingdom of Saudi Arabia.⁸⁷ Moreover, this Regulation constitutes a significant improvement with respect to the previous situation where the arbitration agreement, though valid, was unenforceable.⁸⁸ The Arbitration Regulation of 1983 expressly states that:

" If the parties have agreed to arbitrate before the occurrence of the dispute (i. e., arbitration clause), or if the arbitration agreement relating to a specific existing dispute has been approved by the Court, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation."⁸⁹

Consequently, if there is an arbitration agreement the courts will not decide the dispute submitted by a party who refuses to co-operate in arbitration. However, the Regulation grants the courts the power to hear the dispute in some specific cases, such as when the arbitral tribunal does not render its award within ninety days or within the time limits provided by the parties to the dispute or when the arbitral award is challenged by one of the parties before the court.

In practice, the authorities originally having jurisdiction over the disputes always refer the disputes to arbitration, when one or both parties to dispute invokes the arbitration agreement or when the parties agree upon a stay of court proceedings and to resort to arbitration, such as the case of Nal. Co. for Adm. & Serv. Ltd (Services company) v. S. Co. Ltd (Maintenance company).⁹⁰ These authorities

Commercial Arbitration, p. 165.

⁸⁷ EL-AHDAB, Abdul Hamid., supra note (25), p. 611.

⁸⁸ VAN DEN BERG, Albert Jan., supra note (17). p. 14.

⁸⁹ The Arbitration Regulation of 1983, Art. 7.

⁹⁰ The Arbitral Award No. 1107/1/K 1408, dated 22/08/1410 A.H.(1990 A.D.).

usually require the parties to submit their dispute to arbitration, when the contract concluded between them contains a clause referring any dispute arising out of the performance of this contract to arbitration. For example, the case of Mr. R. M. R. (Saudi natural person) v. Comm. S. A. R. Co. & R. H. Co. (Construction companies) where the parties entered into a construction contract to build a new hotel for the first party. They inserted in the contract a provision submitting any dispute arising from the performance of the contract to arbitration. Accordingly, when the dispute arose between the parties, the competent judicial authority (the Board of Grievances) refused to hear the dispute because of the existence of an arbitration clause in the contract.⁹¹

The Arbitration Regulation of 1983 does not set forth whether a party should invoke the arbitration agreement at the beginning of court proceedings or the court should on its own motion stay court proceedings and refer the case to arbitration.

Accordingly, one legal writer considers that the Arbitration Regulation of 1983 may be interpreted as enabling a party to invoke the arbitration agreement at any stage of the court proceedings, but if this party abuses his right, such as when he invokes the arbitration agreement at the end of the proceedings or before the judgment is made without good reasons, the arbitration agreement may be ignored in this case.⁹²

However, it seems that the party to the dispute should invoke the arbitration agreement before taking any step in the court proceedings because if he does not raise that at the beginning of the proceedings, he may lose the advantage of the arbitration agreement and he should comply with the court proceedings.

Moreover, the parties to the dispute may sometimes determine in their contract a limited period within which any dispute arising out of the performance of this contract should be submitted to arbitration or the parties have the right to bring this dispute before the authority having competence to hear the dispute.

However, if the parties submitted their dispute to arbitration, in spite of the

⁹¹ The Arbitral Award No. 1733/1/K 1411, dated 25/09/1412 A.H.(1992 A.D.).

⁹² EL-AHDAB, Abdul Hamid., *supra* note (25), p. 612.

expiry of this limited period, and they participated in certain sessions of the arbitral process, they would lost the right to resort the case to the competent authority and to refuse to settle the dispute by arbitration because they did not invoke this special provision in the first session of arbitration. For example, the case of Civ. W. Co. (Contracting company) v. Int'l. Gen. Ins. Co. (Insurance company) where one of the parties requested from the arbitral tribunal to stay arbitration proceedings because the parties to the dispute had recourse to arbitration after the expiry of the limited period within which the parties should submit their dispute to arbitration. However, the arbitral tribunal refused the request on the basis that this party participated in a number of the sessions of the arbitral process and it did not invoke this provision in the first session of arbitration.⁹³

⁹³ The Arbitral Award No. 15/1407, dated 18/10/1408 A.H.(1988 A.D.).

Chapter four

The Arbitrators

The constitution of the arbitral tribunal is one of the most important elements regarding the arbitral process. The success of arbitration mainly depends on the arbitral tribunal.

There are several reasons for the appointing of the arbitrators without delay. The early nomination of arbitrators usually reduces the time required for resolving disputes by arbitration. Moreover, no useful procedural directions or steps in the arbitral process can be made until the arbitrators have been appointed because most steps concerning arbitration are normally made by the arbitrators, such as fixing the dates of the sessions, studying all written statements and documents presented by the parties to the dispute and administering hearings and testimony.

However, there are certain arbitral institutions which attempt to deal with the earliest aspects of the arbitral process arising before the establishment of the arbitral tribunal. For example, according to the ICC Arbitration Rules, the ICC's Secretariat will assume the task of submitting the request for arbitration to the respondent for his answer and of appointing the arbitral tribunal and commencing the arbitration proceedings. If the respondent fails to do so within thirty days from the receipt of the request for arbitration, the Secretariat will report to the ICC International Court of Arbitration which will proceed with the arbitration and appoint an arbitrator for commencing the arbitral proceedings.¹

This chapter will treat the major matters relating to the arbitrators, such as their number, appointment, qualifications, powers, duties and liabilities, challenge, and fees and expenses.

The chapter will be divided into several sections as follows:

- Number of arbitrators.
- Appointment of arbitrators.

¹ The ICC Arbitration Rules, Art. 4 (1).

- Qualifications required of arbitrators.
- Powers of arbitrators.
- Duties and liabilities of arbitrators.
- Dismissal and challenge of arbitrators.
- Fees and expenses of arbitrators.

This chapter first attempts to discuss these matters regarding arbitrators and explain the different positions of the national arbitration laws of various countries, and the international and institutional rules of arbitration. It then sets forth the position in the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

4.1 Number of arbitrators

An arbitral tribunal may consist of one or more arbitrators. In principle, the wishes of the parties to the dispute are the basic foundation in determining the number of arbitrators, whether there be an arbitration clause or a submission agreement, unless the arbitration law contains a mandatory provision restricting the wishes of the parties to the dispute, such as when the arbitration law stipulates that the number of arbitrators must be uneven. In this case, the parties to the dispute should respect this provision or their arbitration agreement will be invalid.

Indeed, there are many national arbitration laws which contain this provision. For example, the Netherlands Arbitration Act of 1986 states that:

“ The arbitral tribunal shall be composed of an uneven number of arbitrators. The arbitral tribunal may also consist of a sole arbitrator.”²

As well, certain international conventions governing arbitration as a method of resolving disputes explicitly stipulate that the number of arbitrators must be uneven. For example, the Convention on the Settlement of Investment Disputes between States and Nationals of other States concluded in Washington in 1965 provides that:

“ The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.”³

In practice, the arbitral tribunal is usually composed of a sole arbitrator or a panel consisting of three arbitrators. In a few cases, however, the arbitral tribunal may consist of more than three arbitrators.

² The Netherlands Arbitration Act of 1986, Art. 1026 (1).

³ The Washington Convention of 1965, Art. 37 (2) (a).

4.1.1 Sole arbitrator

The arbitral tribunal is often composed of a sole arbitrator chosen by the parties to the dispute, whether the arbitration is an *ad hoc* or institutional. However, the parties to the dispute may choose a specialist arbitral institution to supervise the arbitration proceedings. This institution may be given in advance the power to appoint a sole arbitrator by itself without the need to consult the parties to the dispute.

Sometimes, when the parties submit their dispute to one of the specialist arbitral institutions, such as the American Arbitration Association (AAA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) to resolve it but the parties have not agreed upon the number of arbitrators, the rules of some of these arbitral institutions state that a sole arbitrator will be appointed unless there are reasons supporting the appointment of three arbitrators. The LCIA Arbitration Rules and the ICC Arbitration Rules contain such provisions. For example, the ICC Arbitration Rules provide that:

“Where the parties have not agreed upon the number of arbitrators, the Court (ICC Court) shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such a case the parties each have a period of 30 days within which to nominate an arbitrator.”⁴

There are some advantages and disadvantages in submitting a dispute to a sole arbitrator.⁵ The main advantages when the parties refer their dispute to a sole arbitrator are that arbitration will be cheaper because the parties to the dispute will only have to bear the fees of one arbitrator not three. Sometimes, the arbitration

⁴ The ICC Arbitration Rules, Art. 2 (5).

⁵ For further details, DAVID, René., *Arbitration in International Trade*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1985, p. 224; CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *International Chamber of Commerce Arbitration*, 2nd Ed., New York, London & Rome Oceana Publications, INC., and Paris, ICC Publishing S. A., 1991, p. 205; also REDFERN, Alan & HUNTER, Martin., *Law and Practice of International Commercial Arbitration*, 2nd Ed., London, Sweet & Maxwell, 1991, p. 203.

administered by a sole arbitrator may be free when this arbitrator is a common friend of the parties to the dispute or when the arbitration is administered under the supervision of certain social or professional organisations which offer their arbitration services for nothing to their members or even to any person requiring them.⁶

Moreover, the dispute will be settled quickly since a sole arbitrator will not have to spend time in consultation with colleagues in an endeavour to reach an agreed determination of the aspects in dispute.

However, there are certain disadvantages in referring a dispute to a sole arbitrator, such as a sole arbitrator may find out that he is responsible for deciding a case containing different legal, financial and technical disputes which requires more than one specialist expert for resolving it. In international commercial arbitration, a sole arbitrator may face some difficulties to render an arbitral award because there may be differences of language, culture, politics and economic development between the parties to the dispute and the arbitrator.

In common law countries, recourse to a sole arbitrator will be natural since most cases are decided at first instance by a single judge.⁷ However, in civil law countries, recourse to three arbitrators is common because a panel of three judges usually decides most cases.

4.1.2 Three arbitrators

In most international commercial arbitrations, the arbitral tribunal usually consists of three arbitrators unless the amount of the dispute is small. The same often applies in many domestic commercial arbitrations.

When the parties to the dispute have not agreed upon the number of arbitrators in their arbitration agreement, whether an arbitration clause or a

⁶ DAVID, René., *supra* note (5). p. 224.

⁷ *Ibid.*, p. 225.

submission agreement, certain international arbitration rules state that the arbitral tribunal will be composed of three arbitrators. For example, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law of 1985 provide that:

“ If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.”⁸

In the case of the arbitral tribunal composed of three arbitrators, each party to the dispute will be able to nominate an arbitrator and the third arbitrator may be nominated by the two party-nominated arbitrators or by the mutual agreement of the parties to the dispute themselves.

In fact, this method will give each party to the dispute a feeling of confidence in the arbitral tribunal and then in its award.⁹ As well, the three arbitrators sometimes have different experiences and qualifications, a technical expert and a lawyer for instance, which help to reach a satisfactory arbitral award to the parties.

In international commercial arbitration, there may be differences of language, culture, politics and economic development between the parties to the dispute and also between the arbitrators themselves. In this case, each party-nominated arbitrator will make sure that there is not any misunderstanding concerning the case of his appointing party in the mind of the other arbitrators which may appear during the deliberations of the arbitral tribunal.

However, an arbitral tribunal of three arbitrators is expensive and it generally takes longer to obtain an award from three arbitrators than from a sole arbitrator because three arbitrators, especially in international commercial arbitration often live in different places and they may have other activities which cause some difficulties in determining dates of hearings acceptable to the arbitrators and the parties to the dispute.¹⁰

⁸ The UNCITRAL Arbitration Rules, Art. (5) and see the same meaning in the UNCITRAL Model Law of 1985, Art. (10).

⁹ REDFERN, Alan. & HUNTER, Martin., *supra* note (5), p. 204.

¹⁰ DAVID, René., *supra* note (5), p. 224.

4.1.3 Even number of arbitrators

In a few cases, the parties to the dispute may agree in their arbitration agreement that the arbitral tribunal is composed of an even number of arbitrators, two or four for instance.

The question which arises in these cases is whether or not the constitution of the arbitral tribunal is valid.

National arbitration laws of different countries adopt different positions. Certain national arbitration laws, such as Spanish law and certain laws of Latin America do not permit an arbitral tribunal composed of an even number of arbitrators.¹¹ Accordingly, these laws do not recognise the validity of the arbitration agreement.

Some national arbitration laws, such as Egyptian and Italian laws, consider that the arbitral award made by an even number of arbitrators is null and void.¹² However, in some other national arbitration laws, such as French¹³ and Dutch laws, the two arbitrators or the competent authority, such as the court can appoint an additional arbitrator who shall preside over the arbitral tribunal. The Netherlands Arbitration Act of 1986, for instance, states that:

“ If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal.”¹⁴

On the other hand, according to certain trade associations rules, the parties to the dispute usually nominate an arbitral tribunal of two arbitrators. However, if these two arbitrators are unable to agree upon a specific decision they will choose an

¹¹ Ibid., p. 227.

¹² HĀSHIM, M. M., *al-Nazariyyah al-‘Ammah lil Taḥkīm fī al-Mawāḍ al-Madaniyyah wa al-Tidjāriyyah (The General Theory of Arbitration in the Commercial and Civil Procedure)*, Cairo, Egypt, 1990, p. 186.

¹³ The French Code of Civil Procedure of 1980, Art. 1454.

¹⁴ The Netherlands Arbitration Act of 1986, Art. 1026 (3).

umpire who will decide the disagreed aspects of this case. In this case, the umpire will hear the case as a single arbitrator. For example, the Federation of Oil, Seed, and Fats Association (FOSFA) states in its Rules of Arbitration and Appeals that:

- “ (a)- Each party shall appoint an arbitrator who shall be a member of the Arbitration and Appeal Panel of the Federation and who shall have accepted the appointment.
- (b)- If two arbitrators have been appointed they shall, if and when they disagree, appoint an umpire from the Arbitration and Appeal Panel. If the arbitrators fail to agree on the appointment of an umpire. they shall notify the Federation which shall appoint an umpire from the Arbitration and Appeal Panel.” ¹⁵

4.1.4 Large number of arbitrators

The arbitral tribunal is rarely composed of more than three arbitrators. However, in some exceptional cases, the parties to the dispute may appoint five, seven or more arbitrators according to political, economical or practical considerations. For example, in the case of the Iran-United States Claims Tribunal which itself consists of nine arbitrators. Three are nominated by each party and three arbitrators are nominated from third countries in accordance with the UNCITRAL Arbitration Rules.

The Tribunal is divided into three chambers, each of which hears cases. The full Tribunal of nine arbitrators meets periodically to deal with some cases between the two governments and other cases which raise issues of special importance.¹⁶

¹⁵ The FOSFA Arbitration and Appeals Rules, Art. 1 (a) (b).

¹⁶ For further details, see REDFERN, Alan & HUNTER, Martin. , *supra* note (5). pp. 50-51.

4.1.5 The position in the Kingdom of Saudi Arabia

In *the Sharī'ah*, which is the supreme law in the Kingdom of Saudi Arabia, there is no restriction relating to the number of arbitrators which may be an even or an odd number. The parties to the dispute have full freedom to agree upon the number of arbitrators.¹⁷

It is desirable to set forth the position before and after the issue of the Arbitration Regulation of 1983.

4.1.5.1 Before the issue of the Arbitration Regulation of 1983

The Saudi legal regulations, which have contained some provisions governing arbitration, such as the Commercial Court Regulation of 1931, the Labour and Workmen Regulation of 1969, and the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 have not adopted one uniform position in respect of the number of arbitrators.

While the Commercial Court Regulation of 1931 did not require in its provisions that the number of arbitrators should be even or odd, the Labour and Workmen Regulation of 1969 provides for a sole arbitrator for both parties, or two arbitrators and umpire.¹⁸

On the other hand, the Implementation Rules of the Chambers of Commerce and Industry Regulation issued in 1981 state that the number of the arbitral tribunal should be three.¹⁹

However, although these Regulations governing arbitration in the Kingdom of Saudi Arabia have differed in regard to the requirement of an uneven number of

¹⁷ EL-AHDAB, Abdul Hamid., *Commercial Arbitration with the Arab Countries*, London, Graham & Trotman, 1990, p. 41.

¹⁸ The Labour and Workmen Regulation of 1969, Art. 183.

¹⁹ The Implementation Rules of the Chambers of Commerce and Industry Regulation of 1981, Art. 49.

arbitrators, commercial customs and practice require the parties to the dispute to appoint an uneven number of arbitrators.²⁰

4.1.5.2 After the issue of the Arbitration Regulation of 1983

The Arbitration Regulation of 1983 explicitly requires that the number of arbitrators must be uneven. It states that:

“ If there are several arbitrators, their number must be uneven.”²¹

According to this Regulation, a deadlock, which may arise in the case of the difference of opinion between the members of the arbitral tribunal composing of an even number, will disappear because the arbitral award will be rendered by a majority of votes.

In fact, it seems that the Saudi legislator has adopted the requirement of uneven number of arbitrators since the issue of the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 because the Implementation Rules of the Chambers of Commerce and Industry Regulation in Article 49 require that the number of arbitrators should be three.

The question may arise validity of the arbitration agreement when the parties to the dispute have agreed in their agreement upon an even number of arbitrators.

This question is theoretical because the parties to the dispute, in practice, respect any restriction imposed by the Arbitration Regulation of 1983 or by its Implementation Rules of 1985. However, if this situation happened it seems likely that the authority originally having jurisdiction over the dispute will instruct the parties to the dispute to modify the arbitration agreement and to appoint an odd number of arbitrators before this authority approves the arbitration agreement.

²⁰ HEJAILAN, Salah., *National Reports; Saudi Arabia*, 1979, vol. IV, The Yearbook of Commercial Arbitration, p. 167; also LERRICK, A. & MIAN, Q. J., *Saudi Business and Labour Law*, London, Graham & Trotman, 1982, p. 185.

²¹ The Arbitration Regulation of 1983, Art. 4.

In practice, the parties to the dispute usually appoint an arbitral tribunal which is composed of three arbitrators to decide their dispute, such as the case of A. Co. (Contracting company) v. Sh. J. Co. for Ins. (Insurance company)²² and also the case of R. R. Co. (Subcontracting company) v. A. C. C. Co. for Con. Ltd (South Korean construction company).²³

Nevertheless, there are certain cases which were decided by a sole arbitrator, such as the case of Mr. S. A. S. (Sudanese natural person) v. A. Co. Ltd (Insurance company) & H. Co. for H. C. (Hire cars company)²⁴ and the case of M. Co. for Con. (Construction company) v. S. Ins. C. & Comm. Co. Ltd (Insurance company).²⁵

²² The Arbitral Award No. 5/1407, dated 11/04/1410 A.H. (1990 A.D.).

²³ The Arbitral Award No. 4/1408, dated 13/08/1408 A.H. (1988 A.D.).

²⁴ The Arbitral Award issued on 16/09/1406 A.H. (1986 A.D.).

²⁵ The Arbitral Award No. 8/1408, dated 29/08/1408 A.H. (1988 A.D.).

4.2 Appointment of arbitrators

The appointment of arbitrators is an important procedural step to commence the arbitration proceedings. The parties to the dispute, as a general rule, have an absolute right to appoint an arbitral tribunal by themselves, or by a third party chosen by them, or by co-operation between them and a third party.

Sometimes, the parties to the dispute appoint a sole arbitrator who constitutes the arbitral tribunal. Moreover, the arbitral tribunal is often composed of three arbitrators where each party to the dispute normally nominates an arbitrator and the third arbitrator is appointed by the two party-nominated arbitrators or by the mutual agreement of the parties themselves.

However, when the parties to the dispute are unable to agree upon the appointment of a sole arbitrator or where the two party-nominated arbitrators are unable to agree upon a third arbitrator, the competent authority to hear the dispute, such as the court will do this task. This authority, in nominating an arbitrator, shall have to respect any qualification required of the arbitrator by the agreement of the parties to the dispute.²⁶

Countries have adopted different positions in respect of the necessity to determine the names of arbitrators in the arbitration agreement, whether an arbitration clause or a submission agreement.²⁷

In some countries, such as Tunisia, it is necessary that the parties to the dispute indicate the names of arbitrators in their arbitration agreement, or this agreement will be null and void. In some other countries, such as France and Italy, the arbitration agreement must contain the names of arbitrators or at least how they are appointed, or it will be null and void. The French Code of Civil Procedure, for instance, states that:

“ A submission is null unless it establishes the object of the dispute. Subject

²⁶ DAVIDSON, Fraser., *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, Edinburgh, Scotland, W. Green, 1991, p. 65.

²⁷ For further details, DAVID, René., *supra* note (5), pp. 227-28; also H \ddot{A} SHIM, M. M., *supra* note (12), pp. 156-74.

to the same sanction, it must either appoint the arbitrator or arbitrators or set forth the manner in which they are to be appointed.”²⁸

Moreover, in some other countries, such as many Arabic countries and countries of Latin America, and the United States, the court has the power to nominate the arbitrators, if the parties to the dispute do not appoint them in the arbitration agreement. For example, the Netherlands Arbitration Act of 1986 provides that:

“ If the appointment of the arbitrator or arbitrators is not made within the period prescribed in the preceding paragraph, the arbitrator shall, at the request of either party, be appointed by the President of the District Court. The other party shall be given an opportunity to be heard.”²⁹

On the other hand, if the parties to the dispute submit their dispute to one of the arbitral institutions, such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA) the parties have the right to appoint the arbitrators. However, if they are unable to agree upon the appointment of the arbitral tribunal these institutions under their own arbitration rules will appoint the arbitrators. For example, the ICC Arbitration Rules provide that:

“ If the parties fail so to nominate a sole arbitrator within 30 days from the date when the Claimant’s Request for Arbitration has been communicated to the other party, the sole arbitrator shall be appointed by the Court (ICC Court).”³⁰

The same rules also apply when the need is to appoint a third arbitrator in an arbitral tribunal of three arbitrators where the ICC International Court of Arbitration will nominate him.

Moreover, certain arbitral institutions offer their services as appointing authority although arbitration is not to be administered according to their rules. These

²⁸ The French Code of Civil Procedure of 1980, Art. 1448.

²⁹ The Netherlands Arbitration Act of 1986, Art. 1027 (3).

³⁰ The ICC Arbitration Rules, Art. 2 (3).

institutions do such services for a modest fee, such as the ICC, or without charging any fee, such as the ICSID.³¹

In addition, the parties to the dispute may sometimes appoint the arbitral tribunal by the list system where each party compiles a list of three or more persons he considers as accepted arbitrators. These lists are exchanged between the parties to the dispute in an attempt to reach an agreement upon the names of arbitrators. In this case, it is important to verify that persons listed are willing to serve as arbitrators.

The list system is used by some arbitral institutions, such as the American Arbitration Association (AAA) where these institutions send out the same list of names to each party to the dispute who then returns the list, deleting any name to which he objects and grading the remainder in order of preference. The appointing authority then chooses arbitrators from the list according to the preference indicated by the parties to the dispute.³²

On the other hand, a party to the dispute may refuse to appoint an arbitrator or fail to nominate him within the time limits specified in the applicable law, such as within thirty days in the UNCITRAL Arbitration Rules.³³ In this case, the competent authority, such as the court will have the power to appoint the arbitrator on the basis of the request of the other party to the dispute.

The question of the validity of the appointment of an arbitrator after the expiry of the time limits may arise.

It is desirable that the competent authority to hear the dispute considers the reasons leading the party to appoint his arbitrator after the expiry of the time limits before it rejects such appointment.³⁴

It is preferable that arbitrators are nominated by the parties after the dispute has arisen because in this case, the parties to the dispute can choose arbitrators who have sufficient experience to deal with the dispute. A person who is appointed as an

³¹ REDFERN, Alan & HUNTER, Martin., *supra* note (5), p.210.

³² *Ibid.*, pp. 210-11.

³³ The UNCITRAL Arbitration Rules, Art. 11 (3) (a).

³⁴ For further details, RUBINO-SAMMARTANO, Mauro., *International Arbitration Law*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1990, p. 205; and also DAVIDSON, Fraser., *supra* note (26), pp. 63-64.

arbitrator before the occurrence of the dispute, may be too busy, ill or dead when the dispute has arisen.³⁵

Moreover, it is necessary that the person chosen as an arbitrator accepts his task before inserting his name in the arbitration agreement since this acceptance will determine the rights and obligations of the arbitrator and the parties to the dispute. For instance, the arbitrator should make his arbitral award within the time limits fixed in the arbitration agreement.

4.2.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 contain the methods which deal with the appointment of the arbitral tribunal. The major method is that the parties to the dispute have a full freedom to appoint the arbitral tribunal, whether a sole arbitrator who is appointed by the mutual agreement of the parties or three arbitrators where each party to the dispute appoints an arbitrator and the third arbitrator is appointed by the two party-nominated arbitrators. The Implementation Rules of 1985 state that:

“ The arbitrator(s) is appointed by agreement of the parties in an arbitration agreement.”³⁶

Moreover, the Arbitration Regulation of 1983 gives the competent authority, such as the Board of Grievances the power to appoint the arbitrators if the parties to the dispute are unable to agree upon them or if either of the parties does not nominate his arbitrator. The Regulation expressly states that:

“If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s), or if one or more of the arbitrators refuses to

³⁵ REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 207.

³⁶ The Implementation Rules of 1985, Art. 6.

assume his task or withdraws, or something prevents him from carrying out his task, or if he is dismissed, and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrator upon request of the party who is interested in expediting the arbitration.”³⁷

In the case of Mr. R. M. R. (Saudi natural person) v. Comm. S. A. R. Co. (Contracting company) & R. H. for Cont. (Subcontracting company), the competent authority, which was the Board of Grievances, appointed the third arbitrator when the two-party arbitrators were unable to agree upon the choice of the third arbitrator.³⁸

The parties to the dispute may have a special clause in the arbitration agreement that they will, for instance, apply to the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 in respect of the appointment of the arbitral tribunal. In this case, the arbitral tribunal will be composed of three arbitrators where each party to the dispute appoints an arbitrator and the Chairman of the Chamber of Commerce and Industry, where the arbitration takes place, will appoint the third arbitrator. In addition, the Chairman has the power to appoint a replaced arbitrator if any arbitrator does not appear or excuses himself from attendance.³⁹

Moreover, according to the Labour and Workmen Regulation of 1969, the arbitral tribunal consists of two arbitrators where each party to the dispute appoints an arbitrator. However, if the two arbitrators do not reach an award they will appoint an umpire who will decide the dispute. The Chairman of the Primary Committee for the Settlement of Labour Disputes concerned will appoint the umpire, if the two arbitrators are unable to agree upon him.⁴⁰

In addition, the Implementation Rules of 1985 state that:

“ A list containing the names of arbitrators shall be prepared by agreement among the Minister of Justice, the Minister of Commerce and the Chairman

³⁷ The Arbitration Regulation of 1983, Art. 10.

³⁸ The Arbitral Award No. 1733/1/K 1411, dated 25/09/1412 A.H. (1992 A.D.).

³⁹ The Implementation Rules of the Chambers of Commerce and Industry Regulation, Arts. 49, 52.

⁴⁰ VAN DEN BERG, Albert Jan., *International Handbook on Commercial Arbitration, Saudi Arabia*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 17.

of the Board of Grievances. Courts, Judicial Committees, and Chambers of Commerce and Industry shall be informed of such lists and respective parties may select arbitrators from these lists or from others.”⁴¹

However, these lists have not been prepared so far and there is a recent trend to ignore their preparation.

The Arbitration Regulation of 1983 does not provide for any specific time limit within which the parties to the dispute should appoint their arbitrators. Nevertheless, any unreasonable delay or refusal by a party to the dispute would justify resorting to the competent authority to appoint arbitrators.⁴² In fact, it is important that the Saudi legislator reviews and revises the Arbitration Regulation of 1983 and its Implementation Rules of 1985 for filling this gap.

As well, the Arbitration Regulation of 1983 explicitly requires a written acceptance of the arbitrator before the commencement of the arbitration proceedings because the Regulation stipulates that the arbitration instrument must contain the names of arbitrators, their signature and their acceptance to hear the dispute before the competent authority approves this instrument. It states that:

“ The parties to the dispute shall file the arbitration instrument with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorised attorneys, and by the arbitrators, and it must state the details of the dispute, the names of the arbitrators and their acceptance to hear the dispute.”⁴³

⁴¹ The Implementation Rules of 1985, Art. 5.

⁴² NADER, M. J., *Settlement of disputes through arbitration; the Kingdom of Saudi Arabia*, A paper presented to the First Arab Regional Conference organised by the International Bar Association, Cairo, Egypt, 15-19 Feb. 1987, p.146; also the same Author, NADER, M. J., *Aspects of Saudi Arabian Law*, Jeddah & Riyadh, The Kingdom of Saudi Arabia, 1990, p. 8.

⁴³ The Arbitration Regulation of 1983, Art. 5.

4.3 Qualifications required of arbitrators

There are considerable differences between the national arbitration laws of various countries, and international and institutional rules of arbitration about the qualifications required in a person who acts as an arbitrator in domestic and international arbitrations.

However, most laws and rules require that an arbitrator must have specific qualifications, such as an arbitrator must have full legal capacity, sufficient experience regarding the dispute, and impartiality and independence. Certain other qualifications are imposed by some national arbitration laws, such as a person who acts as an arbitrator must be a lawyer according to Spanish law.⁴⁴

It can be summarised that the most important qualifications required of an arbitrator by most national arbitration laws of various countries, and international and institutional rules of arbitration as follows:

- Full legal capacity.
- Experience and training.
- Impartiality and independence.

4.3.1 Full legal capacity

National arbitration laws of various countries usually require that an arbitrator should have full legal capacity by which he is capable of conducting the arbitral process. For example, the Netherlands Arbitration Act of 1986 provides that:

“ Any natural person of legal capacity may be appointed as arbitrator.”⁴⁵

⁴⁴ DAVID, René., *supra* note (5), p. 250.

⁴⁵ The Netherlands Arbitration Act of 1986, Art. 1023.

Accordingly, an arbitrator should not be an incapacitated person, such as an insane, a minor, a prodigal or an imbecile because the relationship between the parties to the dispute and arbitrators requires reciprocal rights and obligations at the same time.

The incapacity of an arbitrator may prevent his nomination or cause his challenge or his replacement by the competent authority to hear the dispute, such as the court.⁴⁶

The arbitral process is conducted by a natural person only. A legal person itself cannot be an arbitrator in the arbitral tribunal but it can organise the arbitral process since the director or the chairman of this legal person represents it before the court and the third party, and this person may change at any time. Consequently, in this case, it is difficult to carry out the arbitral process. Some national arbitration laws of various countries, such as the Dutch and French laws, expressly provide that the function of arbitrator will be given to a natural person only.⁴⁷

The stipulation of full legal capacity may raise certain questions concerning the capacity of women and foreigners to act as arbitrators as follows.

4.3.1.1 Arbitration by women

Many national arbitration laws impose restrictions in respect of the capacity of a person to act as an arbitrator, he should for example have the capacity to be invested with public duties.

The question which may arise is whether or not the arbitration conducted by a woman or by an arbitral tribunal of which one or more of its members is a woman is valid, especially in some countries which do not allow to a woman to assume public duties.

In the past, a large number of laws considered that women were under some disabilities, particularly in respect of the testimony and the assumption of the

⁴⁶ RUBINO-SAMMARTANO, Mauro., *supra* note (34), p. 206.

⁴⁷ The Netherlands Arbitration Act of 1986, Art. 1023; also the French Code of Civil Procedure of 1980, Art. 1451.

judgeship. For example, certain Swiss Cantons deemed, at the beginning of the nineteenth century, that the testimony of two women is equivalent to that of one man.⁴⁸

This question has lost its importance in many countries at the current time. However, there are certain countries, such as many Islamic countries which consider women to be under some disabilities, particularly in respect of testimony.

Sharī'ah scholars differ in respect of the right of women to become judges or arbitrators. The majority of them, *Mālikī*, *Shāfi'ī* and *Ḥanbalī* scholars, think that women are not allowed to be judges or arbitrators due to some religious and social considerations. *The Sharī'ah* requires in a person who wishes to be a judge or an arbitrator to have a full competence to give evidence. According to *the Sharī'ah*, the testimony of women does not equal the testimony of men where the testimony of two women is equivalent to that of one man. Consequently, women are not allowed to assume office in the judiciary or arbitration. Women are generally less experienced than men in regard to business matters.⁴⁹ However, minority of *Sharī'ah* scholars, *Ḥanafī* scholars think that women are allowed to be judge s or arbitrators except in *Hudūd* cases.⁵⁰

In general, it is rare that an arbitral tribunal contains a woman as an arbitrator. However, in most countries, an arbitration agreement has not been avoided and an

⁴⁸ EL-AHDAB, Abdul Hamid., *Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985*, 1986, vol. 3, no. 5, Part 1, Journal of International Arbitration, p. 48.

⁴⁹ For further details IBN ẸUDĀMAH, Muwafaḡ al-Dyyn., *al-Mughnī*, vol. 11, Beirut, Lebanon, Dār al-Kitāb al-‘Arabī, 1983, p. 380; SALEH, Samir., *Commercial Arbitration in the Arab Middle East*, London, Graham & Trotman, 1984, p. 297; AL-DURAYB, S. S., *al-Tanzīm al-Ḳaḍā’ī fī al-Mamlakah al-‘Arabiyyah al- Sa‘ūdiyyah fī ḍw’ al-Sharī‘ah al-Islāniyyah wa Niẓām al-Sulṭah al-Ḳaḍā’iyyah (The Judicial Organisation in the Kingdom of Saudi Arabia in the light of the Islamic Sharī‘ah and judicial authority)*, A thesis submitted for the Degree of Ph.D. to the Islamic al-Imām Muḡammad Bin Sa‘ūd University, 1st Ed., Riyadh, The Kingdom of Saudi Arabia, 1983, pp. 375-85; also AL-DŪRĪ, G. A., *‘Aḡd al-Taḡkīm fī al-Fiḡh al-Islāni wa al-Ḳānŭn al-Waḍ‘ī (Arbitration Contract in the Islamic Sharī‘ah and the Positive Law)*, 1st Ed., Baghdad, Iraq, al-Khulūd Press, 1985, pp. 199-202.

⁵⁰ AL-SHAWKĀN, Muḡammad A. M., *Nayl al-Awṭār; Sharḡ Muntakā al-Aḡhbār*, vol. 8, Egypt, al-Ḥalabī & sons Press, undated, pp. 298-9

arbitral award has not been set aside because the arbitral process was conducted by an arbitral tribunal which has a woman as one of its members.⁵¹

4.3.1.2 Arbitration by foreigners

Countries differ in respect of the validity of the constitution of an arbitral tribunal when it contains one or more foreign arbitrators. Some countries, such as Portugal and certain countries of Latin America do not allow foreigners to act as arbitrators. They require that arbitrators should be nationals. In some other countries, foreigners may be allowed to be arbitrators on the basis of reciprocity between countries. For example, in former Czechoslovakia, foreigners could act as arbitrators provided that, Czechoslovak citizens could act as arbitrators in the countries of these foreigners.⁵²

Moreover, in certain other countries, like Iran, the parties to the dispute have the right to appoint a foreigner as an arbitrator, but if they are unable to agree upon the arbitral tribunal and the competent authority, such as the court is called to nominate arbitrators, it must appoint persons who have their residence within the territorial competence of this authority.⁵³

In other countries, it is allowed that foreigners are appointed as arbitrators along with the nationals of these countries because the appointment of arbitrators depends on the confidence of the parties to the dispute in such arbitrators.

In international commercial arbitration, it is important that the sole arbitrator or the presiding arbitrator in the arbitral tribunal of three arbitrators has a nationality other than that of any of the parties to the dispute. Many international and institutional rules of arbitration, such as the ICSID Arbitration Rules⁵⁴ and the ICC

⁵¹ DAVID, René., *supra* note (5), p. 247.

⁵² *Ibid.*, p. 247.

⁵³ *Ibid.*, p. 247.

⁵⁴ The ICSID Arbitration Rules, Art. 3.

Arbitration Rules explicitly require this issue. For example, the ICC Arbitration Rules provide that:

“ The sole or the chairman of the arbitral tribunal shall be chosen from a country other than those of which the parties are nationals.”⁵⁵

4.3.2 Experience and training

One of the most important qualifications required of an arbitrator is that he should have experience in dealing with the subject-matter of the dispute submitted to arbitration. There is no sense in nominating an arbitrator who is an experienced lawyer if this experience does not include practical experience of arbitration.⁵⁶ Experience will lead to resolve the dispute quickly because an arbitrator does not need to appoint any expert to prepare a report concerning the dispute.

Countries, such as Spain, Portugal and some countries of Latin America require that a lawyer must be appointed as an arbitrator where the dispute is of a legal nature.⁵⁷

Indeed, it is common to nominate a lawyer to act as a sole arbitrator because a lawyer with relevant experience can treat any problem of procedure and conflict of laws better than a person who is experienced in another area. Moreover, when the arbitral tribunal consists of three arbitrators, at least one of them (preferably the presiding one) should be a lawyer, whether the nature of dispute is legal, financial or technical.⁵⁸

Moreover, some countries, such as Iran and Mexico, and also some arbitral institutions, such as the American Arbitration Association (AAA) have lists of

⁵⁵ The ICC Arbitration Rules, Art. 2 (6).

⁵⁶ REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 217.

⁵⁷ DAVID, René., *supra* note (5), p. 250; also REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 214.

⁵⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 215.

persons experienced in arbitration from which arbitrators may be appointed by the parties to the dispute or have to be appointed by the competent authority, such as the court.⁵⁹

In addition, some trade associations, particularly the shipping and commodity trade associations stipulate that arbitrators must be commercial men and members in these associations. For example, the FOSFA Arbitration and Appeals Rules provide that:

“ At the time of their appointment arbitrators and umpire shall be members of the Arbitration and Appeal Panel of the Federation.”⁶⁰

On the other hand, there are certain specialist institutes, such as the Chartered Institute of Arbitrators in England which prepare and run training programmes for the prospective arbitrators, especially in international commercial arbitration. These programmes give persons a good knowledge in the field of arbitration.

4.3.3 Impartiality and independence

In principle, an arbitrator must be and remain impartial and independent until the issue of an arbitral award and settlement of the subject-matter of the dispute.

Most national arbitration laws of different countries explicitly require the impartiality and independence of arbitrators. The Netherlands Arbitration Act of 1986, for instance, provides that:

“ An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.”⁶¹

⁵⁹ For further details, DAVID, René., *supra* note (5), pp. 250-251.

⁶⁰ The FOSFA Arbitration and Appeal Rules, Art. 1(c).

⁶¹ The Netherlands Arbitration Act of 1986, Art. 1033.

Moreover, most international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules contain the same provision which requires that an arbitrator must be impartial and independent.⁶² The LCIA Arbitration Rules, for instance, state that:

“ All arbitrators (whether or not nominated by the parties) conducting an arbitration under these Rules shall be and remain at all times wholly independent and impartial.”⁶³

Arbitrators must be impartial and independent during the arbitral process, particularly when they are appointed by a third party, such as the ICC International Court of Arbitration. However, an arbitrator may feel himself under pressure from the party to the dispute who nominated him since the party has to contact the person whom this party intends to nominate as an arbitrator. This person will discuss with the party to the dispute some aspects relating to the dispute, its nature, the time necessary to have it resolved, the place of arbitration and the required fee before the acceptance of the mission. Consequently, certain international and institutional rules of arbitration, such as the LCIA Arbitration Rules require that each arbitrator should sign a declaration that there are no circumstances likely to give rise to any justified doubts as to his impartiality or independence.⁶⁴

Impartiality of an arbitrator means that this arbitrator is unbiased towards either of the parties to the dispute or in relation to the issue in dispute. It is usual for one of the parties to the dispute to perceive that the nominee of the other party is predisposed towards that party but the degree of bias might range from covert sympathy to the overt taking of instructions from the appointing party. The party to the dispute can challenge an arbitrator on the basis of this bias. However, in many cases, it is difficult to obtain the evidence of bias.⁶⁵

⁶² The UNCITRAL Arbitration Rules, Art. 10 (1).

⁶³ The LCIA Arbitration Rules, Art. 3 (1).

⁶⁴ The LCIA Arbitration Rules, Art. 3 (1).

⁶⁵ REDFERN, Alan & HUNTER, Martin., *supra* note (5), pp. 219-20.

Independence of an arbitrator means that there is not any kind of relationship or financial connection between an arbitrator and one of the parties to the dispute. A person who has a family relationship or financial interest in the result of arbitration should be precluded from acting as an arbitrator.

A confusion may sometimes arise with the interpretation of the terms of impartiality and neutrality of an arbitrator. Neutrality of an arbitrator means that the sole arbitrator or the presiding arbitrator in the arbitral tribunal of three arbitrators does not have the same nationality as one of the parties to the dispute, particularly in international commercial arbitration. The ICC Arbitration Rules, for instance, state that:

“ The sole arbitrator or the chairman of an arbitral tribunal shall be chosen from a country other than those of which the parties are nationals.”⁶⁶

In general, all arbitrators have to be and remain impartial and independent at all times. Either of the parties to the dispute has the right to challenge arbitrators who do not respect the stipulation of the impartiality and independence. For example, in the Mission Insurance Case, the losing party challenged the impartiality of the presiding arbitrator because this arbitrator was discovered to have spent two nights in the hotel room of a female lawyer representing the winning party in the arbitration.⁶⁷

A prospective arbitrator should disclose all facts which may cause his disqualification before the acceptance of the task and he should also disclose new circumstances arising during the arbitral process which may give rise to any doubts as to his impartiality and independence to the parties to the dispute and to his fellow arbitrators.

Either of the parties to the dispute has the right to challenge an arbitrator, if this party has some justifiable doubts as to the impartiality and independence of the arbitrator. However, countries differ in the time within which a party to the dispute should challenge an arbitrator. In some countries, such as the United States, the

⁶⁶ The ICC Arbitration Rules, Art. 2 (6).

⁶⁷ Mission Insurance Case, Wall Street Journal, dated 14/02/1990. p. 1.

challenge of an arbitrator should be postponed until an arbitral award is rendered. Only moment, it can be examined whether or not the arbitrator has been impartial and independent.⁶⁸ In other countries, such as Egypt,⁶⁹ it is important to present the challenge of an arbitrator at an earlier stage of the arbitral process if there are some serious reasons therefor.⁷⁰

An arbitrator must not deal with any *ex parte* communication with the parties to the dispute in respect to the issues of the case during the course of the arbitration proceedings. However, in practice, it is possible to discuss some procedural matters, such as future hearings with only one party to the dispute, provided that all communications with this party are written and furnished to the other party.⁷¹

4.3.4 The position in the Kingdom of Saudi Arabia

The Sharī'ah requires that a person who acts as an arbitrator should be qualified to be a judge. The qualifications required of a judge in *the Sharī'ah* are that he should be of age, of sound mind, male, Muslim, fair, free (not a slave) and knowledgeable of *the Sharī'ah*.⁷²

In fact, legal writers differ in respect of the necessity of the existence of all these qualifications in the person who acts as an arbitrator. Some legal writers think that these qualifications are not necessary to exist in a person who wishes to act as an arbitrator because the Arbitration Regulation of 1983 and its Implementation Rules of 1985 have imposed certain specific qualifications and the parties to the dispute usually appoint arbitrators in whom the parties have confidence.⁷³

⁶⁸ REDFERN, Alan & HUNTER, Martin., supra note (5), p. 229.

⁶⁹ The new Egyptian Arbitration Act of 1994, Art. 19 (3).

⁷⁰ DAVID, René., supra note (5), p. 252.

⁷¹ REDFERN, Alan & HUNTER, Martin., supra note (5), p. 226.

⁷² SALEH, Samir., supra note (49), pp. 36-8.

⁷³ NADER, M. J., *Conciliation and Arbitration in Saudi Arabia under the Chambers of Commerce and Industry*, Jeddah, The Kingdom of Saudi Arabia, Sahar Printing Press, Undated. pp. 12-13.

However, it seems that an arbitrator should have these qualifications imposed by *the Shari'ah* along with the qualifications required by the Arbitration Regulation of 1983 and its Implementations Rules of 1985. Moreover, it can be concluded that the Arbitration Regulation of 1983 implicitly requires these qualifications because it states that:

“ The arbitrator may be challenged for the same reasons for which a judge may be challenged.”⁷⁴

As well, the competent authority, such as the Board of Grievances refuses to ratify any arbitral award issued by an arbitrator not qualified as a judge under *the Shari'ah*.⁷⁵

Most qualifications required by *the Shari'ah* are easy to fulfil except the stipulations of the masculine and Islam which raise some questions. These stipulations will be treated in detail when the stipulation of full legal capacity required by the Arbitration Regulation of 1983 is discussed.

Moreover, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 stipulate certain main qualifications in a person who acts as an arbitrator. These qualifications can be summarised as follows:

- Full legal capacity.
- Experience and training.
- Impartiality and independence.

4.3.4.1 Full legal capacity

The Arbitration Regulation of 1983 explicitly requires that a person who acts as an arbitrator must have full legal capacity. The Regulation states that:

⁷⁴ The Arbitration Regulation of 1983, Art. 12.

⁷⁵ HUSHAN, Mohammed., *The Arab Gulf Countries*, A paper presented to the Euro-Arab Arbitration Conference held in Port EL Kantaoui, Tunisia, 24-27 September 1985, London, Published by Lloyd's of London Press Ltd, 1987, p. 23.

“The arbitrator, and shall have full legal capacity.”⁷⁶

4.3.4.1[i] Arbitration by women

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not explicitly state that women are not allowed to act as arbitrators. Accordingly, some legal writers think that women may sit as arbitrators if the parties to the dispute have agreed upon their appointment.⁷⁷

However, it may seem that the arbitration conducted by woman-arbitrator is invalid, especially that women are under some disabilities to act as arbitrators and the majority of *the Sharī'ah* scholars adopt this view knowing that *the Sharī'ah* is the supreme law in the Kingdom of Saudi Arabia and, thus, must be respected.⁷⁸

In practice, there has not been any case which was resolved by an arbitral tribunal containing a woman-arbitrator. However, the authority originally having jurisdiction over most commercial disputes which is the Board of Grievances, will not approve the arbitration agreement when the arbitral tribunal contains a woman-arbitrator and it will not issue an enforcement order for any domestic arbitral award made by a sole woman-arbitrator or by an arbitral tribunal composed of a woman-arbitrator.⁷⁹

The question may arise in respect of the enforcement of foreign arbitral awards made by a sole woman-arbitrator or by an arbitral tribunal containing a woman-arbitrator.

⁷⁶ The Arbitration Regulation of 1983, Art. 4.

⁷⁷ NADER, M. J., *Conciliation and Arbitration in Saudi Arabia under the Chambers of Commerce and Industry*, A dissertation submitted for the Degree of Master of International Business Administration to the American Pacific University, January 1986, p. 29; also LERRICK, A. & MIAN, Q. J., *supra* note (20), p. 186.

⁷⁸ For details see above, pp. 139 *et esq.*

⁷⁹ This is the opinion of the Commercial Circuits in the Board of Grievances.

In fact, although the issue has not been decided, the competent authority to enforce foreign judgments and arbitral awards will most likely refuse to issue enforcement orders of foreign arbitral awards made by a woman-arbitrator or by an arbitral tribunal containing a woman-arbitrator.⁸⁰

However, there is a recent trend in the Kingdom of Saudi Arabia to allow the enforcement of foreign arbitral awards made by an arbitral tribunal containing a woman-arbitrator because there is different views between Sharīah scholars with respect to the ability of women to act as arbitrators.⁸¹

The question may also arise in respect of the possibility of enforcement of foreign arbitral awards issued by a sole arbitrator or by arbitrators, one of them, which was appointed by a foreign woman-judge.

The Saudi regulations are silent with respect to this question. The Board of Grievances, the competent authority, will most probably enforce these awards because one of the parties may sometimes be a woman who has the right to appoint an arbitrator, *a fortiori*, a third party, such as a woman-judge can appoint an arbitrator when one or both of the parties to dispute are unable to appoint an arbitrator.⁸²

4.3.4.1[ii] Arbitration by foreigners

Foreigners may be appointed as arbitrators, but they must be Muslims. The Implementation Rules of 1985 explicitly state that:

“ The arbitrator shall be a Saudi national or Muslim expatriate.”⁸³

⁸⁰ This information was given to me by a member of the competent circuit to enforce foreign judgments and arbitral awards in the Board of Grievances according to a telephone conversation.

⁸¹ This information was given to me by a member of the Experts Division in the Council of Ministers according to a telephone conversation. In respect of Sharīah scholars' views, see above. p. 140.

⁸² A member of the Board of Grievances gave me this information in a telephone conversation.

⁸³ The Implementation Rules of 1985, Art. 3.

Before the issue of these Rules, some legal writers thought that the stipulation of Islam is not required in the members of the arbitral tribunal because the Arbitration Regulation of 1983 has not required it.⁸⁴ Nevertheless, it is possible to appoint a non-Muslim as an expert for the arbitral tribunal.

In practice, the sole or the presiding arbitrator should be Saudi, whilst the other arbitrators may be Muslim foreigners⁸⁵ because the Saudi arbitrator, in general, has more knowledge and experience concerning *the Sharīah*, and commercial regulations and customs applicable in the Kingdom of Saudi Arabia.

Indeed, there is a practical reason for requiring that an arbitrator must be a Muslim. This reason is that the applicable law on the dispute is normally *the Sharīah*. So, it is necessary that all the members of an arbitral tribunal have a good knowledge and sufficient experience in regard to the applicable law.

In practice, there are a number of cases in which the arbitral tribunals contains at least a foreign Muslim, such as the case of Mr. R. M. R. (Saudi natural person) v. Comm. S. A. R. Co. (Contracting company) & R. H. Co. for Cont. (Subcontracting company) which one of the members of the arbitral tribunal was a Sudanese Muslim⁸⁶ and also the case of S. E. Co. Ltd (Construction company) v. Mr. F. A. N. (Saudi natural person) where a Jordanian Muslim was one of the members of the arbitral tribunal.⁸⁷

On the other hand, many legal writers think that the stipulation of Islam is required only in domestic arbitration, whereas it is not necessary in international arbitration in which one of the parties to the dispute is Saudi, especially when a foreign law is the applicable law on the dispute.⁸⁸ Accordingly, the arbitral award issued in international arbitration may be enforced in the Kingdom of Saudi Arabia,

⁸⁴ NADER, M. J., *supra* note (73), p. 13.

⁸⁵ VAN DEN BERG, Albert Jan., *supra* note (40), p. 15; also TURCK, Nancy B., *Dispute Resolution in Saudi Arabia*, Summer 1988, vol. 22, no. 2, *The International Lawyer*, p. 431.

⁸⁶ The Arbitral Award No. 1733/1/K 1411, dated 25/09/1412 A.H. (1992 A.D.).

⁸⁷ The Arbitral Award No. 5/1407, dated 19/09/1407 A.H. (1987 A.D.).

⁸⁸ EL-AHDAB, Abdul Hamid., *supra* note (17), p. 620.

in spite of one or more of arbitrators being a non-Muslim because the Kingdom of Saudi Arabia has recently ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in January 1994.

Moreover, this view may be upheld by the position of the Kingdom of Saudi Arabia concerning the recognition of arbitration clauses in the past where the Kingdom prohibited the inclusion of any arbitration clause in any domestic commercial contract in which the Government or one of its Agencies is a party, whilst it inserted arbitration clauses in its international commercial contracts, such as the concession contract which was concluded with the AUIXRAP Company in 1965.⁸⁹

4.3.4.2 Experience and training

The Arbitration Regulation of 1983 stipulates in its Article 4 that an arbitrator should have expertise. The Implementation Rules of 1985 contain a provision which sets forth some kinds of the required experience without making them compulsory. These Rules provide that:

“ The arbitrator shall be a Saudi national or Muslim expatriate from the liberal professions or other. In the case of more than one arbitrator, an umpire must have knowledge of *Sharī'ah* rules, commercial regulations, customs and traditions applicable in the Kingdom of Saudi Arabia.”⁹⁰

According to this Article, an arbitrator may be a member of one of the liberal professions, such as a lawyer, an engineer, a doctor and an accountant or he may also be another person, such as a businessman, a trader and a director of a company.

Moreover, the Arbitration Regulation of 1983 requires that at least one of the members of the arbitral tribunal should have a sufficient knowledge of *the Sharī'ah* rules, of commercial regulations and of the customs and traditions applicable in the Kingdom of Saudi Arabia.

⁸⁹ EL-AHDAB, Abdul Hamid., *supra* note (48), p. 49.

⁹⁰ The Implementation Rules of 1985, Art. 3.

Accordingly, it is not necessary that the sole arbitrator or the third arbitrator should have a certificate in *the Sharī'ah* or legal studies but it is necessary that an arbitrator has a knowledge of *the Sharī'ah* rules, commercial regulations and customs. The value of this knowledge is left to estimate by the authority originally having jurisdiction over the dispute, when this authority approves the arbitration instrument containing the names of arbitrators.

In practice, there are certain cases in which the competent authority approved an arbitral award made by an arbitral tribunal which all its members were engineers. The case of S. T. Co. (Construction company) v. Mr. A. A. A. (Saudi natural person) is a good example.⁹¹

However, it is important that the sole arbitrator or the presiding arbitrator in the arbitral tribunal of three arbitrators is a *Sharī'ah* scholar or a lawyer because some legal problems, particularly in respect of procedure often arise during the arbitration proceedings and they need an experienced arbitrator in law to resolve them.

4.3.4.3 Impartiality and independence

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 implicitly require the impartiality and independence of arbitrators. The Arbitration Regulation of 1983 states that:

“ The arbitrator shall have expertise and be of good conduct and behaviour.”⁹²

It can be concluded that the expression of good conduct and behaviour means that an arbitrator should be impartial when he hears the dispute. In addition, the Implementation Rules of 1985 provide that:

“ Any person having an interest in the dispute, may not act as arbitrator.”⁹³

⁹¹ The Arbitral Award No. 10/1409, dated 07/03/1411 A.H. (1991 A.D.).

⁹² The Arbitration Regulation of 1983, Art. 4.

⁹³ The Implementation Rules of 1985, Art. 4.

According to this Article, an arbitrator should be independent and should not have any financial interest in the dispute or he will be open to challenge by either of the parties to the dispute.

In practice, it is not unusual that a party to the dispute appoints either his lawyer or a member of his family as an arbitrator, but he may not act as the sole arbitrator or the presiding arbitrator in the arbitral tribunal of three arbitrators.⁹⁴

The authority originally having jurisdiction over the dispute usually considers that arbitrators are of good conduct and behaviour until proof to the contrary on the basis that the parties to the dispute choose reliable persons to act as arbitrators. If either of the parties to the dispute has some justifiable doubts in respect of the impartiality or independence of an arbitrator, he should challenge this arbitrator before the competent authority within five days from the day the reasons for challenge occur.⁹⁵

It is important that the Saudi legislator explicitly states the requirement of impartiality and independence of arbitrators because that is one of fundamental requirements provided by most laws and rules governing the arbitration.

the Implementation Rules of 1985 consider that a person is disqualified to act as an arbitrator in some situations. These situations can be summarised as follows:

- (a)- Any person has been sentenced to *Ḥad*⁹⁶ or penalty in a crime of dishonour.
- (b)- Any person has been dismissed from a public position following a disciplinary order.
- (c)- Any person has been adjudicated as bankrupt, unless reinstated.⁹⁷

⁹⁴ VAN DEN BERG, Albert Jan., *National Reports, Saudi Arabia*, The Yearbook of Commercial Arbitration, 1984, p. 21, also LERRICK, A. & MIAN, Q. J., *supra* note (20), p. 186.

⁹⁵ The Arbitration Regulation of 1983, Art. 12.

⁹⁶ *Ḥad* is a singular of *Ḥudūd* which mean the crimes which *the Qur'ān* specified their punishments, such as the amputation of the hand in the crime of theft.

⁹⁷ The Implementation Rules of 1985, Art. 4.

In addition, the Implementation Rules of 1985 give the government officials the right to act as arbitrators, provided that the Authorities to which they belong agree to this choice.⁹⁸

⁹⁸ Ibid., Art. 3.

4.4 Powers of arbitrators

It is necessary that the arbitral tribunal has sufficient powers to conduct the arbitration proceedings and to render the arbitral award within the time limits. These powers are conferred upon the arbitral tribunal by the parties to the dispute themselves and also by the law governing arbitration as a means of resolving disputes.⁹⁹

4.4.1 Powers granted by the parties

The parties to the dispute have an absolute freedom to confer powers upon the arbitral tribunal, provided that they respect any restriction imposed by the applicable law.

The parties to the dispute may grant powers to the arbitral tribunal directly where they insert these powers in the arbitration agreement, whether an arbitration clause or a submission agreement. Such powers may include powers to order disclosure of documents, to appoint experts, to receive evidence and so on.

Moreover, the parties may confer powers on the arbitral tribunal indirectly where they choose international and institutional rules of arbitration, such as the ICC Arbitration Rules or the UNCITRAL Arbitration Rules to govern the arbitral process. These rules confer some express powers upon the arbitral tribunal. For example, the UNCITRAL Arbitration Rules state that:

“ Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”¹⁰⁰

⁹⁹ REDFERN, Alan & HUNTER, Martin., *supra* note (5), pp. 258-59.

¹⁰⁰ The UNCITRAL Arbitration Rules, Art. 15 (1).

These Rules confer certain specific powers upon the arbitral tribunal, such as the arbitral tribunal has the power to determine the place of arbitration and the language or languages to be used in the proceedings, unless the parties to the dispute have agreed upon them.¹⁰¹

4.4.2 Powers granted by the applicable law

Most national arbitration laws of different countries confer some powers directly upon the arbitral tribunal. For example, the Netherlands Arbitration Act of 1986 gives the arbitral tribunal the power to determine the place of arbitration if the parties have not determined it.¹⁰² In England, the arbitral tribunal may administer oaths to witnesses who give evidence before it. The new English Arbitration Act of 1996 provides that:

“ The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.”¹⁰³

Moreover, national arbitration laws may confer certain powers indirectly upon the arbitral tribunal by granting these powers to the competent authority, such as the court on behalf of the arbitral tribunal. For example, when a witness refuses to attend a hearing to give evidence the arbitral tribunal can not compel him to attend but the coercive power can only be exercised by the competent authority.

In international commercial arbitration, the powers of an arbitral tribunal will be granted by certain sources, such as the arbitration agreement, the law governing

¹⁰¹ Ibid., Arts. 16(1) and 17(1).

¹⁰² The Netherlands Arbitration Act of 1986, Art. 1037 (1).

¹⁰³ The new English Arbitration Act of 1996, Sec. 38 (5).

¹⁰⁴ REDFERN, Alan & HUNTER, Martin., *supra* note (5), pp. 260-61.

the arbitration agreement and the law governing the arbitral process (*the lex arbitri*).¹⁰⁴

The arbitration agreement usually contains the powers which have been conferred by the parties to the dispute themselves upon the arbitral tribunal. The law governing the arbitration agreement should then be considered to see whether it supports or restricts these powers. Equally, the law governing the arbitral process, *the lex arbitri*, should also be considered to see if there is any restriction in respect of these powers conferred by the parties to the dispute upon the arbitral tribunal.

In principle, the law governing the arbitral process, *the lex arbitri*, will override any express or implied provision of the arbitration agreement conferring specific powers upon the arbitral tribunal if these powers are prohibited. For example, an arbitration agreement may contain a provision which gives the arbitral tribunal the power to administer oaths to witnesses and the law governing the arbitration agreement, such as English law, may include a provision conferring this power the arbitral tribunal. However, if the law governing the arbitral process, such as Swiss law, does not permit a private individual, like the arbitrator to administer oaths, the mandatory provision of the law governing the arbitral process will abrogate the provision of the arbitration agreement.¹⁰⁵

The arbitral tribunal has the power to decide the dispute arising between the parties. However, it must take care to stay within the terms of its power and it must not exceed its jurisdiction. If either of the parties to the dispute objects to the lack or excess of the jurisdiction of the arbitral tribunal, many national arbitration laws, and international and institutional rules of arbitration adopt in express terms the power of the arbitral tribunal to decide upon its own jurisdiction. For example, the Netherlands Arbitration Act of 1986 explicitly provides that:

“ The arbitral tribunal shall have the power to decide on its own jurisdiction.”¹⁰⁶

¹⁰⁵ Ibid., p. 261.

¹⁰⁶ The Netherlands Arbitration Act of 1986, Art. 1052 (1).

The LCIA Arbitration Rules state that:

“ The Tribunal shall have the power to rule on its own jurisdiction.”¹⁰⁷

However, although the arbitral tribunal has the power to decide upon its jurisdiction the competent authority, such as the court has the power to supervise and make sure that the arbitral tribunal does not exceed the extent of its jurisdiction.

Some national arbitration laws, and international and institutional rules of arbitration stipulate that objections to the lack of jurisdiction of the arbitral tribunal should be raised before starting the defence on its merits.¹⁰⁸ For example, the UNCITRAL Arbitration Rules provide that:

- “ 3- A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.
- 4- In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.”¹⁰⁹

4.4.3 The position in the Kingdom of Saudi Arabia

The parties to the dispute are free to confer powers upon the arbitral tribunal, unless these powers conflict with the Arbitration Regulation of 1983 or its Implementation Rules of 1985 or Saudi public policy.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 explicitly confer some powers upon the arbitral tribunal. For example, the arbitral tribunal has the following powers during the course of the arbitration proceedings:

¹⁰⁷ The LCIA Arbitration Rules, Art. 14 (1).

¹⁰⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 284; also CRAIG, W. Laurance, PARK, William W. , and PAULSSON, Jan., *supra* note (5), pp. 189-90.

¹⁰⁹ The UNCITRAL Arbitration Rules, Art. 21 (3,4).

- Power to extend the period fixed for making the award on account of circumstances pertaining to the subject-matter of the dispute.¹¹⁰

- Power to require the personal appearance of the parties to the dispute if the circumstances require so.¹¹¹

- Power to hold the hearing in camera by its own motion.¹¹²

- Power to require from one of the parties to the dispute to produce any relevant document regarding the case by its own motion, or at the request of the other party.¹¹³

- Power to appoint one or more experts if necessary to provide a special report concerning some matters in the case.¹¹⁴

- Power to decide to move, on its own motion or at the request of one of the parties to the dispute, for inspection of something relevant to the case.¹¹⁵

Other powers will be treated and discussed in detail in the next chapter relating to the arbitration proceedings.

It seems that the Arbitration Regulation of 1983 and its Implementation Rules of 1985 contain a number of powers which facilitate the function of the arbitral tribunal during the arbitral process.

¹¹⁰ The Arbitration Regulation of 1983, Art. 15.

¹¹¹ The Implementation Rules of 1985, Art. 17.

¹¹² Ibid., Art. 20.

¹¹³ Ibid., Art. 28. Also this power has been granted by many other arbitration laws, such as the American law. For further details, DOMKE, Martin., *Domke on Commercial Arbitration, revised edition by Gabriel M. WILNER*, New York, Publishing by Clark, Boardman & Callaghan, 1992, p. 370.

¹¹⁴ The Implementation Rules of 1985, Art. 33.

¹¹⁵ Ibid., Art. 35.

4.5 Duties and liabilities of arbitrators

4.5.1 Duties of arbitrators

There are many duties which are imposed upon the arbitral tribunal by the parties to the dispute and the law. It is useful for an arbitral tribunal to draw up for itself a check-list of its specific duties.¹¹⁶ The parties to the dispute may impose these duties before the arbitrators are nominated, or during the course of the arbitral process.¹¹⁷

It would be better that each arbitrator checks the arbitration agreement before accepting the nomination because if he finds himself unable to fulfil the duties mentioned in the agreement, he should ask the parties to the dispute to change them or decline the nomination. For example, when the parties to the dispute require that the arbitral award should be rendered within a specific time after the nomination of the arbitral tribunal and an arbitrator may be unable to render an award within such time. Consequently, he should not accept the nomination if the parties to the dispute refuse to extend the time limits.

Moreover, if the parties to the dispute wish to impose certain duties on the arbitral tribunal during the course of the arbitration proceedings, it is important to consult the arbitrators about these new duties. For example, in construction project disputes, the parties to the dispute may ask the arbitral tribunal to inspect a construction site. Such a matter should firstly be discussed with the arbitrators since if one of the arbitrators feels that he may be unable to accept such duty and the parties insist upon it, he may resign.

On the other hand, the parties may agree to submit their dispute to one of the arbitral institutions whose rules may contain certain provisions imposing specific

¹¹⁶ REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 263.

¹¹⁷ For further details, *Ibid.*, pp. 262-63.

duties. For example, under the ICSID Arbitration Rules, the arbitral tribunal must keep its deliberations secret and it shall take decisions by a majority of the votes.¹¹⁸

There are some main duties which most national arbitration laws of the different countries, and international and institutional rules of arbitration impose on the arbitral tribunal, such as the duty of the arbitral tribunal to treat each party to the dispute equally and to give him a full opportunity to present his case before it. Also, the arbitral tribunal should not discuss the case with one party to the dispute in the absence of the other, unless these discussions concern procedural matters and the absent party has been given proper notice. For example, the Netherlands Arbitration Act of 1986 states that:

“ The parties shall be treated with equality. The arbitral tribunal shall give each party an opportunity to substantiate his claims and present his case.”¹¹⁹

Moreover, many international and institutional rules of arbitration, such as Article 15 (1) of the UNCITRAL Arbitration Rules state the same principle.

However, if an arbitrator fails to treat the parties to the dispute equally the effect will be to make this arbitrator liable to be removed. In many countries, like Switzerland and the Netherlands, this removal can be done without waiting for the arbitral award. Whereas in others, such as the United States the aggrieved party should wait until the end of the arbitration proceedings and the issue of an arbitral award, and then he may challenge this award on the basis of this reason. In addition, the arbitral tribunal must fulfil its task with due care of all aspects during the arbitration proceedings.¹²⁰

The arbitral tribunal should only decide on the subject-matter of the dispute and not exceed its jurisdiction. Therefore, if the tribunal has exceeded its jurisdiction the arbitral award may be set aside or refused to be enforced in whole or in part by the competent authority.

¹¹⁸ The ICSID Arbitration Rules, Arts. 15 (1) and 16 (1).

¹¹⁹ The Netherlands Arbitration Act of 1986, Art. 1039 (1).

¹²⁰ REDFERN, Alan & HUNTER, Martin., *supra* note (5), pp. 228-29.

In addition, the arbitral tribunal is bound to render its award within a limited period after its constitution because the issue of the award within this period is *un obligation de resultat*.¹²¹ Accordingly, if the arbitral tribunal makes the arbitral award after the expiry of the limited period, the award may be set aside and the arbitrators may also be deprived of any entitlement to remuneration.¹²²

4.5.2 Liabilities of arbitrators

If the arbitrators fail to fulfil one of the above mentioned duties the question which may arise is whether or not the arbitrators are liable to the parties to the dispute for loss caused by their wrongful behaviour.

National arbitration laws of various countries differ in the classification of the nature of the relationship between the parties to the dispute and the arbitrators. Some of these laws classify such relationship as a contractual relationship where an arbitrator is nominated by or on behalf of the parties to the dispute to perform a service for a fee. Consequently, if an arbitrator does not fulfil his duties during the arbitral process he may be liable to the parties to the dispute for loss caused by his wrongful behaviour. Nevertheless, his liability is limited to damage caused by intentional act or gross negligence. Some other laws confer immunity from liability upon the arbitral tribunal on the basis that this tribunal performs a judicial or quasi-judicial function.¹²³

Moreover, some international and institutional rules of arbitration deal with the liability of the arbitrators.¹²⁴ For example, the LCIA Arbitration Rules provide that:

¹²¹ LEW, Julian D. M., *The Immunity of Arbitrators; in immunity of arbitrators under French Law written by Jean-Louis DELVOLVE*, London, New York, Hamburg & Hong Kong, Lloyd's of London Press Ltd (LLP), 1990, p. 35.

¹²² REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 268.

¹²³ *Ibid.*, pp. 266-7.

¹²⁴ RUBINO-SAMMARTANO, Mauro., *supra* note (34), p. 218.

“ Neither the Court, nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules, save the arbitrators (but not the Court) may be liable for the consequences of conscious and deliberate wrongdoing.”¹²⁵

In many civil law countries, an arbitrator may be held liable for damages to the parties to the dispute who suffer loss because of his wrongful behaviour. For example, the Austrian Code of Civil Procedure states that:

“ The arbitrator who does not fulfil at all or not in due time the obligations which he has undertaken by acceptance of his appointment, is liable to the parties for all damages caused by his unlawful refusal or delay, irrespective of their right to request the termination of the arbitration proceedings.”¹²⁶

In some other civil law countries, such as Greece, Italy and Spain, the arbitration laws contain explicit provisions dealing with the question of the liability of arbitrators, whereas many other civil law countries, such as Belgium, France, Germany and the Netherlands do not contain express provisions regarding the liability of arbitrators. Indeed, the courts in civil law countries play an important task in determining the scope of the arbitrators' liability.¹²⁷

In most civil law countries, the liability of arbitrators is based on the contractual relationship between them and the parties to the dispute. However, in certain civil law countries, such as France, the liability of arbitrators is confined to loss caused by the intentional act, or gross negligence or fraud.¹²⁸

By contrast, in many common law countries, such as the United States of America, an arbitrator is immune from any liability to the parties to the dispute if he

¹²⁵ The LCIA Arbitration Rules, Art. 19 (1).

¹²⁶ The Austrian Code of Civil Procedure , Art. 584 (2).

¹²⁷ HUASMANINGER, Christian., *Civil Liability of Arbitrators: A comparative Study*, A dissertation submitted for the Degree of LL.M. to the Harvard Law School, Cambridge, U S A, May 1990, pp. 66-67.

¹²⁸ LEW, Julian D. M., *supra* note (121), p. 35; also for details in respect of the issue of fraud, GLICK, Leslie Alan., *Bias, Fraud, Misconduct and Partiality of the arbitrator*, 1967, vol. 22, The Arbitration Journal, pp. 167-68.

does not fulfil his arbitral duties¹²⁹ since it is very difficult to encourage arbitrators to participate in arbitration if they expose themselves to unlimited liability as a result of doing so and this immunity is actually intended to protect and promote the arbitral process more than to protect arbitrators themselves.¹³⁰

However, in some other common law countries, such as England, this immunity is limited to the extent that it protects arbitrators only from claims arising out of their quasi-judicial activities. Consequently, if an arbitrator fails to fulfil one of his contractual obligations, such as not rendering the arbitral award within the time limits as a result of his gross negligence, he may be liable to the parties to the dispute for any loss.¹³¹

Moreover, the new English Arbitration Act of 1996 explicitly states that arbitrators may lose their immunity from liability if they have made a lapse in bad faith, such as the acceptance of a bribe.¹³²

However, if an arbitrator has made an error or a lapse in good faith he will not be liable to the parties for this error or lapse. For example, an arbitrator may make mistakes as a result of misconception of the law because these mistakes are included in the arbitration risk.¹³³

¹²⁹ For further details, SHENTON, David W., *The Liability of Arbitrators, England*, 1980, vol. 8, International Business Lawyer, pp. 335-36; also DOUGLAS, Joel M., *The Scope of Arbitrator Immunity*, June 1981, vol. 36, no. 2, The Arbitration Journal, pp. 35-36.

¹³⁰ HUASMANINGER, Christian., *supra* note (127), p. 19; also LEW, Julian D. M., *supra* note (121); in *immunity of arbitrators under the United States Law* written by David J. BRANSON & Richard WALLACE, p. 86

¹³¹ *Ibid.*, p. 94.

¹³² The new English Arbitration Act of 1996, Sec. 29 (1).

¹³³ GLICK, Leslie Alan., *supra* note (128), p. 165.

4.5.3 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 contain provisions which impose some duties upon the arbitrators. The most important duties imposed upon the arbitral tribunal are as follows:

- The duty of the arbitral tribunal to give each party to the dispute a full opportunity to present his case before it and to treat the parties equally during the course of the arbitration proceedings.¹³⁴

- If a document has been claimed to have been forged or if criminal proceedings have been instituted for forgery or for any other criminal act, the arbitral tribunal must suspend the arbitration proceedings and the date fixed for the award until a final decision is rendered from the competent authority on the incident which had arisen.¹³⁵

- The duty of the arbitrators to sign an award; where one or more arbitrators refuses to sign the award, shall be stated in the instrument of the arbitral award.¹³⁶

Moreover, the Arbitration Regulation of 1983 requires that the arbitral tribunal renders its decision within the time limits. However, if the arbitral tribunal fails to fulfil such duty the Regulation deals with the problem where it provides that:

“ The arbitrators’ decision shall be taken within the time limit specified in the arbitration instrument, unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within 90 days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject-matter or extending the time limit for another period.”¹³⁷

¹³⁴ The Implementation Rules of 1985, Art. 36.

¹³⁵ Ibid., Art. 37.

¹³⁶ The Arbitration Regulation of 1983, Art. 17.

¹³⁷ Ibid., Art. 9.

On the other hand, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not contain any provision concerning the immunity or liability of arbitrators. However, according to the general principles of *the Sharī'ah* an arbitrator may be liable for his gross negligence, such as when he ignores a very vital document presented by one of the parties to the dispute which affects the arbitral award.¹³⁸

When an arbitrator breaches his duties imposed by the parties to dispute or by the law applied to the arbitration, such as when he does not issue an arbitral award or makes it after the expiry of the time limit of arbitration, or when he withdraws from the arbitration at the late stage of proceedings or at the stage of deliberations, or when he discloses the content of his deliberations to third parties, the competent authority to hear the dispute has the power to decide whether or not he is liable according to the circumstances of each case.

It seems that although the Arbitration Regulation of 1983 and its Implementation Rules of 1985 have not dealt with the liability of an arbitrator, an arbitrator should be liable to the parties to the dispute for loss caused by his intentional wrongful behaviour or if he has made a serious lapse, such as accepting a bribe according to the general principles of *the Sharī'ah*.

¹³⁸ HEJAILAN, Salah., *supra* note (20), p. 167.

4.6 Dismissal and challenge of arbitrators

In general, an arbitrator may be dismissed by the mutual consent of the parties to the dispute and also either of the parties has the right to challenge an arbitrator appointed to resolve the dispute, if there are serious reasons which support the challenge, such as if there are circumstances which may give rise to justifiable doubts as to the impartiality or independence of the arbitrator.

This section is divided into three sub-sections. The first will deal with the dismissal of arbitrators. The challenge of arbitrators will be the subject of the second sub-section. The third sub-section will treat and set forth the position in the Kingdom of Saudi Arabia in respect to the dismissal and challenge of arbitrators according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

4.6.1 Dismissal of arbitrators

An arbitrator may only be dismissed by the mutual agreement of the parties to the dispute, whether he was appointed by the parties themselves or by a third party, such as the competent authority to hear the dispute. The mutual consent of the parties for dismissing an arbitrator is required by most national arbitration laws of various countries. For example, the French Code of Civil Procedure states that:

“ An arbitrator may not be dismissed except by the parties’ unanimous consent.”¹³⁹

Nevertheless, an arbitrator may be dismissed, on the request of one of the parties to the dispute, by the court or by the other competent authority determined in the arbitration agreement, if he delays excessively the execution of his duties relating to the arbitral process.¹⁴⁰

¹³⁹ The French Code of Civil Procedure of 1980, Art. 1462.

¹⁴⁰ DAVID, René., *supra* note (5), p. 265.

An arbitrator may be dismissed explicitly or implicitly, such as when the parties to the dispute appoint a new arbitrator who replaces him. Moreover, the parties may notify the decision of the dismissal to the arbitrator orally or by a written letter.¹⁴¹

The parties to the dispute have the right to dismiss an arbitrator at any stage of the arbitration proceedings, but the dismissal should be made before rendering the arbitral award. The dismissed arbitrator may have the right to claim compensation from the parties, particularly if he has started his mission. This is because the parties to the dispute may not have fulfilled their obligations arising out of the contract concluded between them and the arbitrator.

The question may arise as to the effects of dismissal of an arbitrator. In some countries, such as France, the arbitration agreement will lapse, if it has not otherwise been provided by the parties' agreement, and the arbitration proceedings will also be ended. In some other countries, such as England and the United States, a new arbitrator should be nominated in the same manner as the dismissed arbitrator had been nominated. If necessary, the new arbitrator shall be appointed by the competent authority, such as the court.¹⁴²

The dismissal of an arbitrator is likely to cause a delay in deciding the case since a new arbitrator needs some time to examine the written statements presented by the parties to the dispute and to become aware of the subject-matter of the dispute and the arbitration proceedings adopted by the previous arbitral tribunal.

4.6.2 Challenge of arbitrators

The parties to the dispute have the right to challenge an arbitrator if the reasons for challenge have appeared after the appointment of the arbitral tribunal.

¹⁴¹ ABŪ AL-WAFĀ, Aḥmad., *al-Taḥkīm al-'Ikhtiyā'ī wa al-'Idīb ā'ī (Compulsory and Optional Arbitration)*, 4th Ed. , al-Exandaria, Egypt, 1983, pp. 170-71.

¹⁴² For further details, DAVID, René., *supra* note (5), p. 266.

Most national arbitration laws of different countries contain provisions which give the parties to the dispute the right to challenge arbitrators. For example, the Swiss Private International Law Act of 1987 provides that:

“ A party may only challenge an arbitrator whom it has appointed or in whose appointment it has participated on grounds of which it became aware after such appointment. The grounds for challenge must be notified to the arbitral tribunal and the other party without delay.”¹⁴³

Moreover, many international and institutional rules of arbitration contain similar provisions, such as Article 10(2) of the UNCITRAL Arbitration Rules and Article 3(7) of the LCIA Arbitration Rules.

The party to the dispute may challenge an arbitrator if such party convinces the competent authority that he did not know of the reasons for challenge when he appointed the challenged arbitrator.

On the other hand, the party to the dispute may lose his right to challenge an arbitrator if he has participated in the arbitration proceedings in spite of his full knowledge of the reasons for challenge of an arbitrator because the participation of the party in the proceedings is to be interpreted as a waiver of his right to challenge, and as a recognition of the fact that there is no serious reason for challenging an arbitrator.¹⁴⁴

4.6.2.1 Reasons for challenge

An arbitrator may be challenged, particularly in domestic arbitration, for the same reasons as those for which a judge may be challenged. Many civil law countries, such as Egypt, recognise the right the parties to the dispute to challenge the judge. However, in common law countries, there is no procedure provided for challenge of a judge. The judge himself may decide, whether it is proper for him to

¹⁴³ The Swiss Private International Law Act of 1987, Art. 180 (2).

¹⁴⁴ DAVID, René., *supra* note (5), p. 263; also RUBINO-SAMMARTANO, Mauro., *supra* note (34), p. 214.

be a judge in the case or not. In the United States, the courts have the power to revoke the appointment of an arbitrator in some cases. However, the majority of the United States courts has refused to exercise a control on whether or not an arbitrator is fit to deal with a dispute, except when this arbitrator has been nominated by the courts themselves.¹⁴⁵

Most international and institutional rules of arbitration include provisions which state reasons for challenge of an arbitrator. For example, the parties to the dispute may challenge an arbitrator where they have reasonable doubts in relation to his impartiality or independence. The LCIA Arbitration Rules provide that:

“ An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.”¹⁴⁶

Moreover, many national arbitration laws of various countries contain similar provisions, such as Article 1033 of the Netherlands Arbitration Act of 1986.

It is desirable to set forth the most important reasons which may lead to challenge an arbitrator as follows:¹⁴⁷

a- If the arbitrator (or his spouse) has a personal or financial interest in the dispute, such as where he is a creditor, debtor, presumptive heir or a donee of one of the parties to the dispute.

b- If the arbitrator (or his spouse) has a subordinate or employment relationship with one of the parties to the dispute or their representatives. For example, in the Case of *Centrozap v. Orbis*, the Swiss Federal Tribunal found that it was sufficient reason to warrant the disqualification of the arbitrator that his wife was the assistant of the lawyer of one of the parties to the dispute.¹⁴⁸

¹⁴⁵ DAVID, René., *supra* note (5), pp. 256-257.

¹⁴⁶ The LCIA Arbitration Rules, Art. 3 (7).

¹⁴⁷ For further details, CRAIG, W. Laurance; PARK, William W. , and PAULSSON, Jan., *supra* note (5), pp. 227-34; DAVID, René., *supra* note (5), pp. 256-59; EL- AHDAB, Abdul Hamid., *supra* note (17), pp. 87-88; also *ABŪAL-WAFĀ, Aḥmad.*, *supra* note (141), pp. 157-61.

¹⁴⁸ *Centrozap v. Orbis*, 92 Arrêts du Tribunal Fédéral (Switzerland), 1966, pp. 271 *et esq.*

c- If the arbitrator (or his spouse) is a relative of one of the parties to the dispute.

d- If there is or has been a lawsuit between the arbitrator (or his spouse) and one of the parties to the dispute.

e- If there is a friendship or hostility between the arbitrator and one of the parties to the dispute.

f- If the arbitrator has previously given his advice or opinion on the subject-matter of the dispute to one of the parties to the dispute before his appointment as an arbitrator.

In addition, there are certain situations which are less likely to lead to a successful challenge of an arbitrator, such as when one of the parties to the dispute alleges that the relationship between the arbitrator and the other party may be established in the future or when the arbitrator has served in prior arbitration involving one of the parties to the dispute.

In international commercial arbitration, there are other reasons which may cause the challenge of an arbitrator, such as the sole or presiding arbitrator may be challenged, if he is not from a country other than those of which the parties to the dispute are nationals.

In fact, the challenge of an arbitrator is often an attempt to stop or slow down the arbitration proceedings, or to get rid of an arbitrator who, to that challenger's mind, will find against him.¹⁴⁹

4.6.2.2 Time limits for challenge

A challenge of an arbitrator may be made at any stage of the arbitration proceedings. It is preferable that any challenge of an arbitrator is made at the earliest stage of proceedings and before the arbitrator has started to exercise his task. Nevertheless, the parties to the dispute have the right to challenge an arbitrator at late

¹⁴⁹ RUBINO-SAMMARTANO, Mauro., *supra* note (34), p. 215.

stages of the proceedings, provided that the arbitral award has not yet been rendered and within the time limits fixed by the applicable law of the arbitral process.

A challenge of an arbitrator must in some countries be raised within time limits of the party becoming aware of the circumstances giving rise to justifiable doubts as to the arbitrator. This period is fifteen days in some national arbitration laws, such as the new Egyptian Arbitration Act of 1994.¹⁵⁰

Moreover, many international and institutional rules of arbitration require that the challenge of an arbitrator should be submitted to the arbitral tribunal itself or to the court of the institution within a limited time. For example, the request for challenge of an arbitrator should be brought to the ICC International Court of Arbitration within a specific time. The ICC Arbitration Rules state that:

“ For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator by the Court; or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based, if such date is subsequent to the receipt of the aforementioned notification.”¹⁵¹

However, if the party to the dispute fails to follow the time limits of the challenge he will be considered to waive the right to challenge and he should be barred from attacking the arbitral award on the basis of the reason for challenge of an arbitrator.¹⁵²

The concept of waiver is known in civil law countries and in common law countries alike, for example, in *Ghirardosi v. Minister of Highways Case*, the Supreme Court of Canada has said that:

“ There is no doubt that an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.”¹⁵³

¹⁵⁰ The new Egyptian Arbitration Act of 1994, Art. 19 (3).

¹⁵¹ The ICC Arbitration Rules, Art. 2 (8).

¹⁵² REDFERN, Alan & HUNTER, Martin., *supra* note (5), p. 232.

¹⁵³ *Ghirardosi v. Minister of Highways Case* (B.C.), 56 Dominion Law Reports, 1966, pp. 469-75.

4.6.2.3 Procedure for challenge

The procedure for challenge of an arbitrator is to be found in the applicable law of the arbitral process. In *ad hoc* arbitration, the request for challenge may be made in the first instance to the arbitral tribunal itself and then to the competent authority, such as the court which will deal with this request according to the procedure imposed by the applicable law, or the request for challenge may be made directly to the competent authority without the need to submit it to the arbitral tribunal itself.

In institutional arbitration, a request for challenge will be brought to the arbitral tribunal itself or to the court of the institution which will apply to its procedure. For example, under the ICSID Arbitration Rules, any request for challenge should be made immediately, and before the arbitration proceedings are declared closed. The party making this request should state the reasons for challenge in it and the request for challenge will be filed with the Secretary-General of the ICSID. After that, the request for challenge will be referred to all the members of the arbitral tribunal and the opposing party to the dispute. If the request for challenge is directed to a sole arbitrator or to the majority of the arbitrators it will be submitted to the Chairman of the Administrative Council of ICSID who will then make the decision concerning the challenge. However, if the request for challenge is directed to one of the members of the arbitral tribunal the decision will be made by the other two arbitrators who may accept or refuse this request. If they are unable to agree, the decision will be rendered by the Chairman of the Administrative Council of ICSID.¹⁵⁴

¹⁵⁴ The ICSID Arbitration Rules, Art. 9 (1,2,3,4,6).

4.6.2.4 Effects resulting from challenge

In general, the arbitral tribunal is bound to suspend the arbitration proceedings until a decision is made on the request for challenge of an arbitrator, unless there are urgent circumstances which require the continuation of the proceedings, such as the fear of the death of a sick witness or his movement to another place.

However, in some countries, the arbitral tribunal is not bound to suspend the arbitration proceedings but the request for challenge is postponed until the arbitral award is rendered. In fact, this solution may make the challenging party not to participate in the arbitration proceedings because his request for challenge of an arbitrator has been rejected.¹⁵⁵

It is important that the arbitral tribunal suspends the proceedings until a decision in the challenge has been made because if the challenge of an arbitrator is accepted the parties to the dispute will save time and money which they will lose if the request for challenge is exercised after an arbitral award has been rendered. Moreover, in many urgent circumstances, it is possible to resort to the competent court of summary actions to deal with these circumstances.

On the other hand, if the request for challenge of an arbitrator is rejected, the arbitration will proceed; Whereas, if it is accepted, a vacancy will exist in the arbitral tribunal and it should be filled by a new arbitrator before the proceedings resume. However, the arbitral award may be rendered by the other remaining arbitrators when the arbitral tribunal is composed of three arbitrators,¹⁵⁶ or when the request is raised at a late stage of the arbitration proceedings, such as at the stage of deliberations.

It is important to appoint a replacement arbitrator because there are some practical difficulties about conferring upon the two remaining arbitrators the power to decide the case, such as the applicable law of the arbitral process requires that the arbitral tribunal should consist of an uneven number of arbitrators and also this

¹⁵⁵ DAVID, René., *supra* note (5), pp. 263-64.

¹⁵⁶ *Ibid.*, p. 265.

solution will deprive the parties of their equal rights in the composition of the arbitral tribunal.

4.6.2.5 Filling a vacancy

When a request for challenge of an arbitrator is successful, or when an arbitrator dies, resigns, refuses to participate in the arbitration proceedings or becomes incapable of acting, it is necessary that a replacement arbitrator is nominated.

A replacement arbitrator will be generally appointed in the same manner as the challenged arbitrator had been appointed. A replacement arbitrator of sole or third arbitrator will be appointed by the mutual consent of the parties to the dispute, but if they are unable to agree they will have recourse to the competent authority, such as the court for the appointment of a replacement arbitrator.

If a party-nominated arbitrator should be replaced, the same party to the dispute will appoint his successor. However, if such party attempts to paralyse the continuation of the arbitration proceedings the competent authority, such as the court has the power to appoint a replacement arbitrator.¹⁵⁷

After the appointment of a replacement arbitrator, the question which may arise is whether the arbitral tribunal must retrace its steps or not.

The answer to this question depends on whether the oral hearings have been held or not. If the hearings have not been held yet it is not necessary for the arbitral tribunal and the parties to the dispute themselves to go back over old ground. However, it is important to give the replacement arbitrator enough time to study the written statements containing written pleadings, statements of evidence and other documents, and also to consider any procedural directions given by the former arbitral tribunal. After that, the replacement arbitrator should sign his assent and record it in writing.

¹⁵⁷ CRAIG, W. Laurance; PARK, William W. , and PAULSSON, Jan., *supra* note (5), p. 237; also DAVID, René., *supra* note (5), p. 266.

If the replacement arbitrator is appointed after the beginning of oral hearings it will be important to give him time to study the case and to bring the proceedings to the stage of oral hearings where the new arbitrator can participate in the hearings and put questions to the parties, their representatives and witnesses. However, the interests of the parties to the dispute are to try to avoid the repetition of the hearings which require extra time and more money.

On the other hand, in large international commercial arbitrations, the parties to the dispute sometimes insure the lives of arbitrators since when one of such arbitrators dies or becomes incapacitated, the insurance policy will cover at least part of the expenses involved in adjourning the oral hearings, reconstituting the arbitral tribunal and going again over the ground already covered. In this case, the arbitrators should be informed because the insurance companies require medical information or examination.¹⁵⁸

4.6.3 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 distinguishes between the dismissal and challenge of arbitrators. It contains some provisions which govern most aspects relating to the dismissal and challenge of arbitrators.

4.6.3.1 Dismissal of arbitrators

An arbitrator can not be dismissed except by the mutual agreement of the parties to the dispute. Therefore, an arbitrator can not be dismissed by one party to the dispute alone. The aim of that requirement is to protect the arbitral process from stopping and slowing down. The Arbitration Regulation of 1983 explicitly states that:

“ The arbitrator may not be removed except with the mutual consent of the

¹⁵⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (5), pp. 236-37.

parties. Furthermore, he can not be removed except for reasons which occur or appear after the filing of the arbitration instrument.”¹⁵⁹

Before the issue of the Arbitration Regulation of 1983, an arbitrator might be dismissed by one party to the dispute at any time prior to the issue of an arbitral award. Moreover, this position has been adopted by the general principles of *the Shari'ah* except if the appointment of an arbitrator has been approved by a judge. In this case, the dismissal must be made according to the procedure for dismissal of judges.¹⁶⁰

The dismissal of an arbitrator may be done explicitly or implicitly; for instance, when the parties to the dispute choose another arbitrator instead of him. An arbitrator may also be dismissed at any stage of the arbitration proceedings, even after an award regarding part of the subject-matter of the dispute has been rendered. However, the dismissal of an arbitrator must be made before a final award concerning the whole subject-matter of the dispute is rendered.¹⁶¹

On the other hand, the Arbitration Regulation of 1983 expressly gives the dismissed arbitrator the right to claim damages, if he has started his work in the arbitral process and if he has not been the cause of such dismissal.

The dismissal of an arbitrator will lead to appointment of a new arbitrator and the period fixed for deciding the subject-matter of the dispute will be extended thirty days.¹⁶²

¹⁵⁹ The Arbitration Regulation of 1983, Art. 11.

¹⁶⁰ EL-AHDAB, Abdul Hamid., *supra* note (48), p. 52; MOORE, Michael T. & LOTT, Lesile J., *Arbitration under the Saudi Legal System*, February 1981, vol. 4, no. 2, Middle East executive Reports, p. 12; also SALEH, Samir., *supra* note (49), p. 300.

¹⁶¹ AL-GHANY, Eid M., *The Booklet for the Explanation of Saudi Arbitration Rules*, 1st Ed. , Riyadh, The Kingdom of Saudi Arabia, 1984, pp. 31-32.

¹⁶² The Arbitration Regulation of 1983, Art. 14.

4.6.3.2 Challenge of arbitrators

The Arbitration Regulation of 1983 gives either of the parties to the dispute the right to challenge an arbitrator when reasons for challenge appear after the approval of the arbitration instrument by the competent authority. Therefore, if the reasons for challenge have been known by the challenging party before the approval of the arbitration instrument, the competent authority will refuse the request for challenge.

An arbitrator may be challenged for the same reasons for which a judge may be challenged. The Arbitration Regulation of 1983 provides that:

“ The arbitrator may be challenged for the same reasons for which a judge may be challenged.”¹⁶³

The most important reasons for challenge of an arbitrator are the same reasons which were set forth when the challenge of an arbitrator was discussed according to the national arbitration laws of various countries, and international and institutional rules of arbitration.¹⁶⁴

On the other hand, the Commercial Court Regulation of 1931 contains an express provision which specifies the reasons for challenge of judges. It provides that:

“ If a lawsuit has been brought against the President or the member of the Court, if one of them has a financial interest in the case, if he is a partner of one of the parties, if he has given witness statements in his favour, if there is any hostility between a judge and any party or if he is a parent of any party, up to the degree to which a witness statement would be inadmissible. It is sufficient that any of these reasons be established for a judge not to be admitted in the case.”¹⁶⁵

¹⁶³ Ibid., Art. 12.

¹⁶⁴ See above, pp. 169 *et esq.*

¹⁶⁵ The Commercial Court Regulation of 1931, Art. 438.

The procedure for challenge of an arbitrator has been set forth in Article 12 of the Arbitration Regulation of 1983. According to this Article, a request for challenge of an arbitrator shall be submitted to the Authority originally having jurisdiction over the dispute, such as the Board of Grievances within five days from the day on which the party to the dispute was notified of the appointment of the arbitrator or the day on which one of the reasons for challenge has appeared.¹⁶⁶

The party to the dispute brings his request for challenge of an arbitrator directly to the competent authority. The arbitral tribunal itself does not have the power to decide the request for challenge of one of its members. Besides, the Arbitration Regulation of 1983 requires that the request for challenge must be brought within five days from the day on which a reason for challenge has occurred and at any stage of the proceedings, unless the arbitral award has been rendered. It is desirable that the Saudi legislator increases the short period, within which the request for challenge must be brought in order to give the parties to the dispute a sufficient opportunity to prepare and bring their request for challenge of an arbitrator.

When the request for challenge is brought to the competent authority, such as the Board of Grievances this authority will call the parties to the dispute and the challenged arbitrator to a special session for hearing their pleadings and defence. After that, it will render a final decision in respect of the request for challenge.¹⁶⁷

Moreover, when the request for challenge is brought to the competent authority the arbitral tribunal should suspend the arbitration proceedings until the competent authority decides this request. If the request for challenge is rejected the arbitral tribunal will continue the arbitration proceedings. However, if the request is accepted a new arbitrator will replace the challenged arbitrator and the new arbitral tribunal will continue the proceedings after giving the replacement arbitrator enough time to study and review the written statements presented by the parties to the dispute and any documents relating to the dispute.

¹⁶⁶ VAN DEN BERG, Albert Jan., *supra* note (40), p. 15.

¹⁶⁷ The Arbitration Regulation of 1983, Art. 12.

Some legal writers think that the same principles which are applied to the case of the dismissal of an arbitrator will be applied to the case of the challenge of an arbitrator. Therefore, time limits for issuing the arbitral award shall be extended thirty days if the request for challenge of an arbitrator is accepted.¹⁶⁸

However, according to Article 15 of the Arbitration Regulation of 1983, the arbitral tribunal has the right to extend the period fixed for rendering an arbitral award, by its own motion, on account of circumstances pertaining to the subject-matter of the dispute.

¹⁶⁸ SĀLIM, Ṣalāḥ., *Dirāsah Kānūniyyah li Nizām al-Taḥkīm fī al-Mamlakah al-‘Arabiyyah al-Sa‘ūdiyyah* (Legal Study for the Arbitration Regulation in the Kingdom of Saudi Arabia), Riyadh, The Kingdom of Saudi Arabia, Published by the Riyadh Chamber of Commerce and Industry, Undated p. 23.

4.7 Fees and expenses of arbitrators

The cost of a claim before an arbitral tribunal is often higher than the cost of the same claim before a judicial court because judges and the court rooms are paid for by the state, whereas it is necessary for the parties to the dispute to pay the fees and expenses of the arbitral tribunal and the cost of hiring a suitable room or rooms for the conduct of the arbitral process.

In fact, the concept that an arbitrator should be entitled to a fee was not known before the end of the nineteenth century. At that time, the parties to the dispute usually choose a person who is a friend of them to resolve their disputes. This person would have felt offended if he had been offered a fee.¹⁶⁹

In the twentieth century, the concept has changed where an arbitrator has in general the right to claim the parties to the dispute a fee for his work and time spent on the case. However, an arbitrator may lose this right, if he does not fulfil his mission to the end of the arbitration proceedings and does not issue an arbitral award, or if the arbitral award rendered by him is null and void as a result of his negligence or fault.

National arbitration laws of various countries differ in respect of the right of an arbitrator to receive a fee. Many countries, such as England, Italy, Spain and the Netherlands recognise and give an arbitrator this right on the basis that an arbitrator spends a lot of time and effort to resolve the dispute arising between the parties, so he is entitled to receive a fee. In other countries, such as Belgium, France and many civil law countries, an arbitrator is not entitled to a fee, but the parties to the dispute recognise the right of an arbitrator to claim a fee. This may be done explicitly or on the basis of usage.¹⁷⁰

¹⁶⁹ DAVID, René., *supra* note (5), p. 270.

¹⁷⁰ *Ibid.*, p. 271.

4.7.1 Amount of the fees and expenses

The determination of the fees and expenses of the arbitral tribunal differs depending on whether the kind of the arbitration is institutional or *ad hoc*. In institutional arbitration, the amount of the fees and expenses of arbitrators will be fixed by the institution itself or after consultation with the sole or presiding arbitrator according to the arbitration rules of such institution, whereas in *ad hoc* arbitration, the parties to the dispute fix the amount after consultation with the arbitrators themselves or if they are unable to agree upon specific amount, the competent authority, such as the court, will fix it.

Moreover, it is possible that the arbitrators themselves fix the amount of the fees and expenses. However, if they abuse their power and fix a large amount the competent authority has the power to reduce the fees to a reasonable amount on the basis of the request of one or more of the parties to the dispute.

4.7.2 Method of assessing the fees and expenses¹⁷¹

4.7.2.1 Fees of arbitrators

There are at least three methods of assessing the fees payable to arbitrator. First, *the ad valorem method* where fees are calculated as a percentage of the total amount of the dispute. Some arbitral institutions adopt this method, such as the ICC where the ICC International Court of Arbitration in practice fixes the fees of arbitrators within such range, taking into account the time spent, the rapidity of the proceedings and the complexities of the dispute.

Secondly, *the per diem method* which establishes a daily rate for work done by an arbitrator on the case. Such method depends on the arbitrators keeping a record

¹⁷¹ REDFERN, Alan & HUNTER, Martin., *supra* note (5), pp. 250-55.

of the time which they have actually spent and it also depends on the parties to the dispute being prepared to trust this record.

Thirdly, *the “fixed fee” method* where an agreed sum is payable to the arbitrators by the way of remuneration, irrespective of the amounts and the complexity of the dispute or the time spent by the arbitrators. The disadvantage of this method is that it is difficult to know how the case will develop, whether or not it will be resolved in a reasonable time or it will take much time before the arbitral tribunal reaches an award.

On the other hand, when the parties refer their dispute to a specific institutional rules of arbitration, such as the ICC Arbitration Rules or the LCIA Arbitration Rules, they will be bound by the schedule of fees adopted by the rules of this institution.

4.7.2.2 Expenses of the arbitral tribunal

There are two methods of dealing with the expenses of arbitrators. The first is *the reimbursement method* where the arbitrators must keep a detailed note of their expenditure including air fare, hotel expenses and so on. Then, they submit these details to the secretary of the arbitral tribunal or directly to the parties to the dispute for reimbursement. Sometimes, a limit may be imposed on the amount for which an arbitrator will be reimbursed. When the arbitrator exceeds this limit he will pay it from his account.

The alternative method is *the per diem method* where the parties to the dispute will pay the arbitrators’ travelling expenses and they pay an amount fixed as a daily rate to cover hotel and incidental expenses such as meals, telephone calls and so forth. The arbitrator will pay any excess of this fixed allowance.

It is highly desirable for the arbitral tribunal to arrange with the parties to the dispute to make advance payment in respect of its fees and expenses because it is easier to collect payment from the parties to the dispute while the arbitration is in progress than when the proceedings are over. This also helps the parties to the dispute to keep a check on expenses as the case proceeds.

4.7.3 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 contain some provisions which govern the aspects regarding the fees and expenses of the arbitral tribunal. These provisions recognise the right of arbitrators to claim a fee for the effort and time spent by them during the course of the arbitration proceedings.

In principle, the parties to the dispute have the right to fix the amount of the arbitrators' fees after consultation with the arbitrators. However, if they are unable to agree upon a specific amount the authority originally having jurisdiction over the dispute will fix the fees. The Arbitration Regulation of 1983 explicitly provides that:

“ If there is no agreement on the fees of arbitrators, and a dispute ensues, the matter shall be settled by the Authority originally competent to hear the dispute.”¹⁷²

On the other hand, the unpaid portion of the fees of arbitrators must be deposited with the authority originally having jurisdiction over the dispute within five days from the approval of the arbitration instrument. This sum shall be paid within a week from the date on which the enforcement order of the arbitral award has been issued.

In practice, the parties to the dispute usually fix the fees of arbitrators in the arbitration agreement after consultation with the arbitrators themselves. Sometimes, if the parties to the dispute do not fix a specific amount they insert a provision in the arbitration agreement which states that the fees of arbitrators will be paid by the losing party. However, if each party to the dispute fails in some demands the fees of arbitrators will be divided between the parties to the dispute equally where each one will pay the fees of the arbitrator appointed by him and they will share in the fees of the sole or presiding arbitrator.

There are many cases which confirm this practice, like the case of Mr. S. A. S. (Sudanese natural person) v. A. Co. .Ltd (Insurance company) & H. Co. for H. C.

¹⁷² The Arbitration Regulation of 1983, Art. 23.

(Hire cars company) where the losing party paid all the fees of the arbitral tribunal¹⁷³ and also the case of S. Co. for Comm. & Cont. (Commercial & contracting company) v. Comm. S. Co. (Insurance company) where the parties to the dispute shared equally the fees of arbitrators.¹⁷⁴

The Arbitration Regulation of 1983 states in its Article 23 that the decision of the competent authority concerning the fees of arbitrators is final. However, the Implementation Rules of 1985 contain a provision¹⁷⁵ in conflict with Article 23 of the Arbitration Regulation. This provision gives either of the parties to the dispute the right to object to the decision of the competent authority regarding the fees of arbitrators within eight days from being notified of the decision. Such objection will be brought to the competent authority itself.

In fact, it is necessary that the Saudi legislator reviews these provisions and sets forth its position in respect of the finality of the decision of the competent authority concerning the fees of arbitrators.

¹⁷³ The Arbitral Award issued on 16/09/1406 A.H. (1986 A.D.).

¹⁷⁴ The Arbitral Award No. 2/1406, dated 26/05/1406 A.H. (1986 A.D.).

¹⁷⁵ The Implementation Rules of 1985, Art. 46.

Chapter five

The Arbitration Proceedings

The arbitration proceedings are one of the most basic elements relating to the arbitral process. It is important to consider a large number of separate items of arbitration procedure.

This chapter will deal with the main aspects of the arbitration proceedings. It will be divided into several sections as follows:

- Commencement of arbitration.
- The law governing the arbitration proceedings.
- Place of arbitration.
- Language of arbitration.
- Representation of the parties.
- The sessions; administration and record.
- Presence and absence of the parties.
- Amiable composition.
- Written statements.
- Evidence.
- Hearings.
- Court assistance.
- Closure of the hearings.

As usual, this chapter will first set forth the above aspects in the national arbitration laws of various countries and in the international and institutional rules of arbitration. Then, it will explain the position in the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

5.1 Commencement of the arbitration Proceedings

The constitution of the arbitral tribunal is one of the most important steps in getting the arbitral process to start. The arbitral tribunal once appointed in the case of *ad hoc* arbitration usually assumes the task of notice of the date of the first session to the parties to the dispute by its secretary as does the secretariat of the arbitral institution in institutional arbitration.¹ The previous chapter clarified the most major matters concerning the arbitral tribunal, such as its constitution, powers, duties and so on.

Arbitration procedures start from the date on which the claim arises and is brought to arbitration. This section will be divided into two sub-sections. The first sub-section will treat the request for arbitration whereas the notifications of the parties will be the subject of the second sub-section.

5.1.1 Request for arbitration

In *ad hoc* arbitration, the parties to the dispute usually attempt to agree upon the names of members of the arbitral tribunal and then refer their request for arbitration to these arbitrators. However, if they are unable to agree upon the names of the arbitrators they normally submit their request for arbitration to the competent authority like the court to commence the arbitral process. The parties to the dispute sometimes refer their request for arbitration to the arbitral tribunal when there is an arbitration clause containing the names of arbitrators who accept their appointment and many detailed aspects concerning the arbitral process for commencing the arbitration proceedings.

¹ The term of arbitration proceedings in this work means the period from submitting the request for arbitration with the statement of the parties to the dispute until the closure of the proceedings for rendering the arbitral award.

If one of the parties to the dispute, almost always the respondent, fails to respect the arbitration agreement, whether an arbitration clause or a submission agreement, the other party will prepare a request for arbitration and refer it to the competent authority which will help to commence the arbitral process by appointing the respondent's arbitrator and so forth.

In institutional arbitration, the party wishing to commence an arbitration will generally submit his request for arbitration to the secretariat of the arbitral institution. The request should include several matters such as the names and addresses of the parties to the dispute, the arbitration agreement, the statement of the claimant and any statement of any matters concerning the number of arbitrators, the place and language of arbitration, and so on. The ICC Arbitration Rules, for instance, state that:

“ The Request for arbitration shall *inter alia* contain the following information;

- a- names in full, description, and addresses of the parties,
- b- a statement of the Claimant's case,
- c- the relevant agreements, and in particular the agreement to arbitrate, and such documentations or information as will serve clearly to establish the circumstances of the case,
- d- all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Article 2 above.”²

Other institutional rules of arbitration include similar provisions such as Article 2(3) of the AAA International Arbitration Rules and Article 1 of the LCIA Arbitration Rules.

On the other hand, most national arbitration laws of various countries, and international and institutional rules of arbitration, in general, state that the arbitration proceedings will commence when the request for arbitration is received by the respondent or by the secretariat of the arbitral institution, or when the last arbitrator accepts his mission in the arbitral process.

In certain countries, such as England, the parties to the dispute have the right to determine the date of the commencement of the arbitration proceedings or the proceedings will be considered to commence when the request for arbitration is

² The ICC Arbitration Rules, Art. 3 (2).

received by the respondent. The new English Arbitration Act of 1996, for instance, states that:

- “ (1)- The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.
- (2)- If there is no such agreement the following provisions apply.
- (3)- Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.”³

In some other countries, such as France, the arbitration proceedings start from the date on which the last arbitrator accepts his mission. The French Code of Civil Procedure states that:

“ If the arbitration agreement does not establish a deadline, the mission of the arbitrators shall last only six months from the day the last arbitrator has accepted his mission.”⁴

The rules of arbitral institutions differ in determining the date of the commencement of the arbitration proceedings. For example, the ICC Arbitration Rules provide that:

“ The date when the Request (request for arbitration) is received by Secretariat of the Court shall, for all purposes, be deemed to be the date of the commencement of the arbitration proceedings.”⁵

This Article means that the arbitration proceedings will commence when the ICC Secretariat receives a request for arbitration and not when the other party, the respondent, receives this request. Moreover, the same provision has been inserted in some other international and institutional rules of arbitration such as Article 2(2) of

³ The new English Arbitration Act of 1996, Sec. 14.

⁴ The French Code of Civil Procedure of 1980, Art. 1456.

⁵ The ICC Arbitration Rules, Art. 3 (1).

the AAA International Arbitration Rules and Article 1 of the LCIA Arbitration Rules. However, certain other international and institutional rules of arbitration, such as the ICSID Arbitration Rules state that:

“ The tribunal shall be deemed to be constituted and the proceedings to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.”⁶

Moreover, the UNCITRAL Arbitration Rules provide that:

“ Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.”⁷

If there are differences between the applicable law governing the arbitration proceedings, and the international and institutional rules of arbitration chosen by the parties to the dispute in respect of the date of commencement of the proceedings the applicable law will prevail.⁸ For example, the ICC Arbitration Rules consider the commencement of the arbitration proceedings is from the date on which the ICC’s Secretariat receive the request for arbitration submitting by the claimant.⁹ However, when the English law is the applicable law of the arbitral process the arbitration proceedings will commence from the date on which the respondent is notified of the request for arbitration unless the parties to the dispute have agreed otherwise.¹⁰ In this case, the English law will prevail and the commencement of the arbitration proceedings will be considered from the date on which the respondent receives the request for arbitration.

⁶ The ICSID Arbitration Rules, Art. 6 (1).

⁷ The UNCITRAL Arbitration Rules, Art. 3 (2).

⁸ For further details, REDFERN, Alan & HUNTER, Martin., *Law and Practice of International Commercial Arbitration*, 2nd Ed. , London, Sweet & Maxwell, 1991, pp. 196-98.

⁹ The ICC Arbitration Rules, Art. 3 (1).

¹⁰ The new English Arbitration Act of 1996, Sec. 14 (4).

5.1.1.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 distinguish two situations. The first is when the arbitration stems from a submission agreement. In this case, the request for arbitration “the arbitration instrument” should be referred by both parties to the authority originally having jurisdiction over the dispute in order to obtain its approval. This request should contain the names of the parties to the dispute and arbitrators, the signatures of all of them, the details of the dispute and copies of the documents concerning the dispute.¹¹ Then, the competent authority will approve the request for arbitration and notify its decision to the arbitral tribunal and the parties to the dispute.¹²

When the request for arbitration has been approved the arbitration proceedings will commence from the date of the first session to hear the case fixed by the arbitral tribunal within no later than five days of the date on which the tribunal receives the decision of the competent authority regarding the approval of the request for arbitration.¹³ Accordingly, the statute of limitations will stop running from that date.

The second situation is when the arbitration is based on an arbitration clause. The arbitration proceedings will commence directly when the arbitral tribunal fixes the date of the first session to hear the case unless one of the parties to the dispute, almost always the respondent, fails to appoint his arbitrator. In this case, the other party resorts to the authority originally having jurisdiction over the dispute which will appoint the respondent’s arbitrator. After that, the arbitral tribunal commences the arbitration proceedings by determining the date of the first session.¹⁴

¹¹ The Arbitration Regulation of 1983, Art. 5.

¹² The Implementation Rules of 1985, Art. 7.

¹³ Ibid., Art. 10.

¹⁴ EL-AHDAB, Abdul Hamid., *Commercial Arbitration with the Arab Countries*, London, Graham & Trotman, 1990, p. 626.

In practice, the position is different because the parties to the dispute should submit a request for arbitration “an arbitration instrument” to the authority originally having jurisdiction over the dispute, whether or not arbitration stems from an arbitration clause or a submission agreement. This matter was discussed, when the arbitration agreement was treated in chapter three.¹⁵

5.1.2 Notifications of the parties

After receiving the claimant’s request for arbitration and the documents annexed thereto by the arbitral tribunal or by the competent authority such as the courts in *ad hoc* arbitration or by the secretariat of the arbitral institution in institutional arbitration, a copy of the request and the documents annexed thereto shall be delivered to the respondent for his answer within a specific period. For example, the AAA International Arbitration Rules provide that:

- “ 1- Within forty five days after the date of the commencement of the arbitration, a respondent shall file a statement of defense in writing with the claimant and any other parties, and with the administrator for transmittal to the tribunal when appointed.
- 2- At the time a respondent submits its statement of defense, a respondent may make counter-claims.”¹⁶

Many national arbitration laws of various countries such as the German law¹⁷ and also some institutional rules of arbitration ICC Arbitration Rules do not require formal procedure or the application of the court procedures concerning the notifications and communications of the parties to the dispute.

¹⁵ For details, Chapter three, pp. 86 *et seq.*

¹⁶ The AAA International Arbitration Rules, Art 3 (1, 2).

¹⁷ GLOSSNER, Ottoarndt., *Commercial Arbitration in the Federal Republic of Germany*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 16.

In arbitration, the party to dispute may be notified by the other party or by the post. However, it is important to make sure that this party has received the notice. This matter can be confirmed by sending a registered letter to the address of that party. Some institutional rules of arbitration, such as the ICC Arbitration Rules adopt this means where they state that:

“ All notifications or communications from the Secretariat and the arbitrator shall be validly made if they were delivered against receipt or forwarded by registered post to the address or last known address of the party for whom the same are intended as notified by the party in question or by the other party as appropriate.”¹⁸

However, certain other national arbitration laws such as the Lebanese law require that the arbitral tribunal should follow formal procedure like the court procedure when it notifies and communicates the parties to the dispute during the arbitration proceedings.¹⁹

5.1.2.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 clarify in detail all the aspects regarding the notification and notice of the parties to the dispute. They state that the clerk of the authority originally having jurisdiction over the dispute shall be in charge of all the notifications and notices concerning the arbitral process.

In practice, when the parties to the dispute choose one of the Saudi Chambers of Commerce and Industry as a place of arbitration the secretary of arbitration in this Chamber will act as the clerk of the arbitral process instead of the clerk of the competent authority and he will notify the parties to the dispute. After the issue of the arbitral award, the secretary of arbitration usually submits the award to the clerk of

¹⁸ The ICC Arbitration Rules, Art. 6.

¹⁹ ABŪ AL-WAFĀ, Aḥmad., *al-Taḥkīm al-'Ikhtiyā'ī wa al-'Idjibā'ī (Compulsory and Optional Arbitration)*, 4th Ed., Al-Exandaria, Egypt, 1983, p. 217; also EL-AHDAB, Abdul Hamid., *The Lebanese Arbitration Act*, 1996, vol. 13, no. 3, Journal of International Arbitration, p. 79.

the competent authority in order that the competent authority may make an enforcement order of the award.

The Implementation Rules of 1985 require some formal procedure to be followed when the secretary of arbitration notifies the parties to the dispute.²⁰

²⁰ The Implementation Rules of 1985 in Articles 11, 12, 13, 14 and 15 require many formal procedures in respect of the notification of the parties to the dispute during the arbitral proceedings. These procedures can be summarised as follows:

- (1)- All notifications and notices relating to the arbitral process are made through the clerk of the competent authority and are sent through a bailiff or the official authorities.
- (2)- The notice must be in the Arabic language and in two or more copies, in accordance with the number of the parties to the dispute. It must contain the following particulars;
 - (a)- the day, month, year and hour at which this notice or communication is made;
 - (b)- the name and first name of the party making the request, its occupation and domicile as well as the name and first name of its representative and his occupation and domicile;
 - (c)- the name of the bailiff giving the notice, his address and his signature on the original and the copy;
 - (d)- the name and first name of the party to be served as well as its occupation and domicile, or, if the latter is not known at the time of the issue of the notice, then its latest domicile;
 - (e)- the name and occupation of the person to which the copy of the notice has been handed over, as well as his signature witnessing receipt of the original or, as the case may be, a note of his refusal to sign the original when it is returned to the authority;
 - (f)- the name of the arbitral tribunal, its seat, the object of the notice and the date on which it was made.
- (3)- All notices should be handed over to the person concerned at his actual or elected domicile. However, when the person required to be notified is not present in his domicile the notice should be handed over to any agent or administrator of his property, to a person in his employ or any other person staying with him, husband, wife, parent or servant.
- (4)- If the bailiff does not find anyone to whom to deliver the notices or if such person refuses to receive the notices, the bailiff should state that on the original of the notice and on the same day give it to the police authority for the district in which such person is domiciled. The bailiff should also within 24 hours send the addressee a registered letter informing him that the notice has been given to the administration (the police authority). The notice shall be considered valid and effective from the time of the delivery of the notice in the afore-mentioned way.
- (5)- Except as provided for in particular regulations, the copy of notice shall be served as follows;
 - (a)- for the State, it should be delivered to the ministers, or the provinces governors, or the directors of governmental administrations or to the persons who represent them;
 - (b)- for government agencies, it should be delivered to their representative or his deputy;
 - (c)- for companies, associations and private establishments, it should be delivered at their headquarters, as indicated in the Commercial Register. to the President of the Board, the General Director or their representatives. With respect to foreign companies which have a branch or agent in the Kingdom of Saudi Arabia, the notice should be delivered to such branch or agent.

It can be concluded that, in requiring these procedures, the Saudi legislator is attempting to eliminate any difficulties which may prevent the commencement of the arbitration proceedings. However, these procedures may lead to delay in the commencement of the proceedings.

In practice, when the parties to the dispute choose one of the Saudi Chambers of Commerce and Industry as a place of arbitration the secretary of arbitration in this Chamber does not usually follow the previous procedures governing the notifications and notices of the parties. In fact, he notifies the parties to the dispute by registered letters or sometimes by fax. The parties to the dispute usually accept this manner and participate in the arbitral process because they wish to resolve their dispute by arbitration.

5.2 The law governing the arbitration proceedings

In principle, the parties to the dispute are free to agree upon the procedural law which the arbitral tribunal follows to administer the arbitration proceedings. If they fail to agree upon specific procedures the arbitral tribunal will assume such task. However, in all cases, it is necessary that the chosen law governing the arbitration proceedings is not contrary to public policy of the country where the arbitration takes place.²¹ The scope of the freedom of the parties may be narrow or wide according to the type of the arbitration, whether a domestic or an international arbitration.

In domestic arbitration, the arbitration proceedings are governed by the procedural law of the same country where the arbitration takes place. However, if the parties to the dispute decide to ignore the provisions of this law the arbitral tribunal should be bound by the parties' agreement. Besides, many countries, such as Italy and Sweden declare that it is unacceptable to conduct a domestic arbitration in those countries subject to a foreign law. Consequently, the arbitral award will not be considered a national award, if a foreign procedural law has governed the proceedings.²²

In international commercial arbitration, the parties to the dispute have the power to choose the procedural law governing the arbitration proceedings. There are some factors which affect the choice of the parties, such as the nationality of the parties, the place of arbitration and the substantive law governing the arbitration.²³

Therefore, the parties to the dispute choose a common procedural law to govern the arbitration proceedings where they are from that tradition or more familiar with such procedure, or else a civil procedural law where they are from countries

²¹ PARRIS, John., *Arbitration Principles and Practice*, London, Granda Publishing, 1983, p. 97.

²² DAVID, René., *Arbitration in International Trade*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1985, p. 306.

²³ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *International Chamber of Commerce Arbitration*, 2nd Ed., New York, London & Rome Oceana Publications, INC.; and Paris, ICC Publishing S. A. , 1991, p. 382.

following the civil system tradition. Moreover, if the parties to the dispute are from both systems the procedural law governing the arbitration proceedings may be derived from each system.²⁴

It is desirable that the parties to dispute choose the procedural law of arbitration before any arbitrator is appointed because the arbitrator wishes to know from the beginning under what procedural law he will perform his mission. The arbitrator has also the right to resign and sue for remuneration when the parties to the dispute decide to change the procedural law governing the arbitration during the proceedings and to apply the new procedural law.²⁵

However, if the parties to the dispute fail to choose the procedural law to be applied to the arbitration proceedings the arbitrators will determine it. In this case, most arbitrators tend to apply the procedural law with which they are familiar and is most closely connected to the dispute.²⁶

The parties to the dispute or the arbitrators often choose the procedural law of the country where the arbitration takes place since the courts of this country will co-operate with the arbitral tribunal to eliminate any difficulties and to continue the arbitral process.

Most institutional rules of arbitration such as the ICC Arbitration Rules provide that:

“ The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.”²⁷

²⁴ Ibid., p. 382.

²⁵ DAVIDSON, Fraser., *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, Edinburgh, Scotland, W. Green, 1991, p. 100.

²⁶ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 375.

²⁷ The ICC Arbitration Rules, Art. 11.

In fact, because the ICC Arbitration Rules do not contain detailed rules of arbitration procedure, the parties to the dispute or the arbitrators, if the parties fail, supply such Rules and fill gaps left by the ICC Arbitration Rules.

A similar rule is adopted by many international conventions governing arbitration, such as the Geneva Protocol of 1923 which states that:

“The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”²⁸

5.2.1 The position in the Kingdom of Saudi Arabia

In general, the procedural rules mentioned in the Arbitration Regulation of 1983 and its Implementation Rules of 1985 are applied to the arbitration proceedings. These rules will be supplemented by the rules inserted in other Saudi regulations as follows:²⁹

(1)- If the arbitration deals with civil or real estate matters, the procedural rules in the Arbitration Regulation of 1983 shall be complemented by those rules concerning the procedures before *the Sharīah* Courts.

(2)- If the dispute is commercial, the procedural rules in the Arbitration Regulation of 1983 shall be supplemented by the procedural rules of the Commercial Court Regulation of 1931.

(3)- If it is a labour dispute, the procedures stated in the Labour and Workmen Regulation of 1969 complement those in the Arbitration Regulation of 1983.

(4)- If the arbitration relates to an administrative dispute between a government or one of its agencies and a private party, the procedure before the Board

²⁸ The Geneva Protocol of 1923, Art. 11 (1).

²⁹ For further details, EL-AHDAB, Abdul Hamid., *Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985*, 1986, vol. 3, no. 6, Part 2, Journal of International Arbitration, pp. 23-24.

of Grievances (administrative court) shall complement the procedural rules of the Arbitration Regulation of 1983.

(5)- If the arbitration is conducted under the supervision of one of the Saudi Chambers of Commerce and Industry, the Chambers of Commerce and Industry Regulation of 1980 shall supplement the procedural rules of the Arbitration Regulation of 1983.

The question which may arise is whether or not the parties to the dispute have the right to choose a foreign law as the law governing the arbitration proceedings held in the Kingdom of Saudi Arabia.

Many legal writers think that it is important to distinguish between domestic and international arbitrations held in the Kingdom of Saudi Arabia.³⁰ In domestic arbitration, the choice of a foreign law as the law governing the arbitration proceedings is null and void because it is necessary to apply the Arbitration Regulation of 1983 and the other Saudi regulations to the arbitral process. But it is acceptable that the parties can choose a foreign law as the law governing the arbitration proceedings in international arbitration held in the Kingdom of Saudi Arabia. However, certain legal writers do not accept such distinction where they think that it is possible to choose a foreign law as the law governing the arbitration proceedings held in the Kingdom of Saudi Arabia whether domestic or international arbitration.³¹

It seems that the practical reality upholds the first opinion because it is difficult to accept that a foreign law is applied to the proceedings in domestic arbitration held in the Kingdom of Saudi Arabia because the authority originally having jurisdiction over the dispute will refuse to make an enforcement order of the arbitral award rendered in this case as a domestic arbitral award.

³⁰ For further details, LERRICK, A. & MIAN, Q. J., *Saudi Business and Labour Law*, London, Graham & Trotman, 1982, pp. 188-89.

³¹ *Ibid.*, p. 189.

5.3 Place of arbitration

In general, the parties to the dispute are free to agree upon the place of arbitration. However, if they are unable to agree upon it the place of arbitration will be determined by the arbitral tribunal itself or by the competent authority such as the court in *ad hoc* arbitration. In contrast, in institutional arbitration, the arbitration usually takes place in the city where the arbitral institution has its seat, particularly when the parties to the dispute and arbitrators are unable to agree upon a specific place as a place of arbitration. The LCIA Arbitration Rules, for instance, provide that:

“The parties may choose the place of arbitration. Failing such a choice, the place of arbitration shall be London, unless the Tribunal determines in view of all the circumstances of the case that another place is more appropriate.”³²

In domestic arbitration, the arbitration usually takes place in the country where the arbitral process is conducted by its law. In this case, the parties to the dispute have the right to choose one of the cities of the country in which the arbitration is held.

In international arbitration, there are several factors to be taken into account when the parties to the dispute determine the place of arbitration.³³ The most important factors can be summarised as follows:

1)- The nationality of the parties to the dispute because the arbitration is usually held in a neutral country.

2)- The need to cut down as far as possible the expenses of arbitration is taken into consideration when the place of arbitration is determined.

³² The LCIA Arbitration Rules, Art. 7 (1).

³³ For further details, DAVID, René., *supra* note (22), p. 283; REDFERN, Alan & HUNTER, Martin., *supra* note (8), pp. 296-97; also RUBINO-SAMMARTANO, Mauro., *International Arbitration Law*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1990, p. 325.

3)- Economic factors such as the freedom to transfer the necessary funds and amounts from and to the country connected.

4)- Political factors where some countries impose restrictions such as visa conditions on the entry of the members of the arbitral tribunal, the parties to the dispute and their representatives, and witnesses.

5)- Legal factors such as the national arbitration laws of some countries may not permit foreign lawyers to represent the parties to the dispute in the arbitration proceedings which take place in their territories.

6)- Practical considerations such as the availability of relevant rooms for hearings, accommodations, good transportation facilities by air or by rail, good communications by fax, telephone and telex, and so on.

Some cities such as Geneva, London and Paris are the most popular places in which international commercial arbitrations are held since these places have modern arbitration laws and many facilities which assist the arbitral tribunal to administer the arbitration process effectively and quickly. By contrast, the developing countries attempt to attract international commercial arbitrations in their territories. However, problems regarding arbitration may arise because these countries do not have sufficiently developed arbitration laws or sometimes they do not have arbitration laws at all.³⁴ Many developing countries like Egypt have recently issued new arbitration laws which deal with most aspects concerning the arbitration as a means of resolving disputes.

On the other hand, the determination of the place of arbitration does not necessarily mean that all meetings and hearings must be held at that place if it is more convenient for the members of the arbitral tribunal to meet elsewhere for hearing witnesses, experts or the parties to the dispute, or for inspection of goods, or documents. However, the arbitral tribunal should meet at the place of arbitration for the purpose of drawing up and signing the arbitral award.

Moreover, the place of arbitration may be changed when some serious reasons appear; for instance when the travel to the country, where the arbitration

³⁴ REDFERN, Alan & HUNTER, Martin., *supra* note (8), pp. 302-3.

takes place, becomes impossible since such country has entered into war or the place of arbitration was destroyed by a strong earthquake.

5.3.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not contain any provision concerning the place of arbitration. In fact, the parties to the dispute are free to choose any Saudi city, such as Riyadh, Jeddah, *al-Dammām* and so on as the place of arbitration.

The question may arise of the validity of domestic arbitration which is held outside the Kingdom of Saudi Arabia.

In theory, this type of arbitration may be held outside the Kingdom of Saudi Arabia as long as the arbitral process complies with the Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985.³⁵

In practice, the authority originally having jurisdiction over the dispute will not approve an arbitration instrument if it contains provisions which allow holding the arbitration abroad. Further, this authority will not recognise and enforce an arbitral award rendered in domestic arbitration held outside the Kingdom of Saudi Arabia.

In addition, the Ministry of Commerce issued a resolution in 1979 which does not permit clauses providing for arbitration in a foreign country in the articles of association of a Saudi company, in services agency agreements, and in distributorship and commercial agency agreements between a Saudi national and a foreign party. Accordingly, there is a belief amongst Saudi businessmen that the domestic arbitration should be held inside the Kingdom of Saudi Arabia. However, one legal writer thinks that such belief is not warranted.³⁶

³⁵ TURCK, Nancy B., *Dispute Resolution in Saudi Arabia*, Summer 1988, vol. 22, no. 2, The International Lawyer, p. 432.

³⁶ VAN DEN BERG, Albert Jan., *International Handbook on Commercial Arbitration, Saudi Arabia*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, pp. 18-19; also HEJAILAN, Salah., *Change in Saudi Arbitration Law*, December 1981, Middle East Markets,

It seems that it is possible that the arbitration takes place in any place inside the Kingdom of Saudi Arabia if it is more appropriate to the arbitral tribunal and the parties to the dispute, such as when the arbitral tribunal moves to another Saudi city for inspection of the site of the dispute. However, the arbitral tribunal must issue its award in the place chosen as the place of arbitration.

5.4 Language of arbitration

If the parties to the dispute do not give the language of arbitration sufficient attention at the time the arbitration agreement is drawn up, it may cause some difficulties later on.

In domestic arbitration, the national language must in some countries be used as the language of the arbitration proceedings. For example, in most countries such as Kuwait, the national language which is Arabic must be used for the pleadings, the documents, in arguing the case before the arbitral tribunal and in the arbitral award.³⁷ However, two languages may be used during the arbitration proceedings, particularly when the documents regarding the case are written in a language other than the national language of the country of arbitration and the most important documents should be translated to the language of arbitration.

In international arbitration, the wishes of the parties to the dispute are, in principle, the basic foundation in respect of the determination of the language to be used in the arbitration proceedings. However, if the parties are unable to agree upon the language of arbitration the arbitral tribunal shall determine the language of arbitration.

Most international and institutional rules of arbitration, such as the AAA International Arbitration Rules state that:

“ If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into such language or languages.”³⁸

The parties to the dispute or the arbitrators usually choose the language by which the contract and documents were drafted, and by which letters and

³⁷ RUBINO-SAMMARTANO, Mauro., *supra* note (33). p. 327.

³⁸ The AAA International Arbitration Rules, Art. 14.

correspondences were exchanged between the parties before the appearance of the dispute because this choice will assist to cut down the expenses of translation as far as possible. As well, they may sometimes choose the language of the country in which the arbitration takes place because this choice may assist the arbitral tribunal when it needs the court assistance of that country. However, the arbitral tribunal has the right to order any party to the dispute to translate any relevant documents into the language of arbitration.

5.4.1 The position in the Kingdom of Saudi Arabia

Arabic is the official language of the arbitration proceedings in the Kingdom of Saudi Arabia. The Implementation Rules of 1985 provide that:

“ Arabic is the official language and must be used for all oral or written submissions to the arbitral tribunal. The arbitrators as well as any other present persons can only speak in Arabic and a foreigner unable to do so must be accompanied by a sworn translator who shall sign with him the record of his oral arguments in the minutes.”³⁹

In practice, the parties to the dispute may submit any important documents in another language known to the arbitrators provided that these documents are accompanied by an Arabic translation. Moreover, any expert should draw up his report in Arabic. However, the report made by a foreign expert may be issued in the expert's language together with an Arabic translation.⁴⁰

It seems that the submission of documents concerning the case in foreign language without an Arabic translation to the arbitrators is not acceptable, even if the arbitrators are fluent in the language of these documents.

³⁹ The Implementation Rules of 1985, Art. 25.

⁴⁰ ALLAM, Niel F., *Arbitration in the Kingdom: The New Implementation Rules*, August 1985, vol. 8, no. 8, Middle East Executive Reports, p. 14.

When the arbitral tribunal has accepted certain documents in other than Arabic without an Arabic translation from either party to the dispute, the other party can challenge the arbitral award on the basis that the tribunal did not respect the provision of the Implementation Rules of 1985 which requires that the language of arbitration must be the Arabic language.⁴¹

The Ministry of Commerce approved in 1986 articles of association for a limited liability company called the Saudi Company for Building Materials which provide for arbitration in the English language inside the Kingdom of Saudi Arabia subject to the Arbitration Regulation of 1983 and its Implementation Rules of 1985. However, it is unclear whether this is an oversight or a new policy applied by the Ministry of Commerce despite the explicit provision of the Implementation Rules of 1985 which requires Arabic as the language of arbitration.⁴²

⁴¹ TURCK, Nancy B., *supra* note (35), pp. 430-31.

⁴² *Ibid.*, pp. 431-32.

5.5 Representation of the parties

Many national arbitration laws of various countries give the parties to the dispute the right to appoint counsels or representatives on behalf of them to appear before the arbitral tribunal. For example, the Netherlands Arbitration Act of 1986 expressly provides that:

- “ 1- The parties may appear before the arbitral tribunal in person, be represented by a practising lawyer, or be represented by any other person expressly authorised in writing for this purpose.
2- The parties may be assisted in the arbitral proceedings by any persons they may choose.”⁴³

Moreover, many international and institutional rules of arbitration contain similar provisions such as Article 4 of the UNCITRAL Arbitration Rules and Article 12 of the AAA International Arbitration Rules.

There are certain factors which may lead to select a specific representative, such as his pre-existing knowledge of the dispute or that he is an arbitration specialist and has long experience in this kind of disputes.⁴⁴

In fact, the freedom of the parties to the dispute in respect of the choice of counsels or representatives is not absolute in some countries where their arbitration laws allow the arbitrators to object to the representation of the party to the dispute by counsel. However, this objection may lead to set aside the arbitral award if the party complains that he has not been given the sufficient opportunity to put forward his arguments in the case. Accordingly, some countries such as Belgium and Switzerland recognise the right of the parties to be represented by counsel and they do not allow the parties to waive this right in the arbitration agreement be it an arbitration clause or a submission agreement.⁴⁵

⁴³ The Netherlands Arbitration Act of 1986, Art. 1038.

⁴⁴ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 277.

⁴⁵ DAVID, René., *supra* note (22), p. 294.

The question which may arise is whether a foreign counsel can appear before the arbitral tribunal or this appearance is limited to the local counsel.

Countries adopt different positions in respect of this question. Many countries, such as Australia, France and Hong Kong expressly give the parties to the dispute the right freely to appoint counsels or representatives, whether local or foreign, to appear on behalf of them before the arbitral tribunal.⁴⁶

In some other countries, such as Japan, the matter is unclear because there are doubts in respect of the ability of a foreign counsel to appear before the arbitral tribunal in the arbitration held in these countries.⁴⁷

However, some other countries do not allow a foreign counsel to appear at hearings before the arbitral tribunal in the arbitration held in their territories.⁴⁸ In fact, this prohibition may cause some negative results for such countries because the parties in international commercial arbitration will not choose such countries as places of arbitration.

5.5.1 The position in the Kingdom of Saudi Arabia

The Implementation Rules of 1985 give the parties to the dispute the right to appear personally or through representatives before the arbitral tribunal during the arbitration proceedings. These Rules require that the power of attorney must be issued by a notary public or by any other official authority or certified by one of the Saudi Chambers of Commerce and Industry. In addition, a copy of the power of attorney must be included in the file of the case after the arbitral tribunal has examined the original.⁴⁹

⁴⁶ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), pp. 278-80.

⁴⁷ *Ibid.*, p. 280.

⁴⁸ *Ibid.*, p. 280.

⁴⁹ The Implementation Rules of 1985, Art. 17.

The question which may arise the ability of foreigners to act as representatives of the parties to the dispute before the arbitral tribunal, particularly only Saudi nationals appear before the Saudi Courts as representatives of the parties.

In fact, the provisions of the Implementation Rules of 1985 are silent on this point and they do not restrict the freedom of the parties in respect of the nationality of their representatives. Consequently, the parties to the dispute may be represented before the arbitral tribunal by foreign representatives.

In practice, there are certain cases in which one of the parties to the dispute was represented by a foreign counsel before the arbitral tribunal, such as the case of M. Co. for D. P. & Comm. (Commercial company) v. S. N. E. Co. Ltd (Insurance company) where one of the parties was represented by an Egyptian lawyer.⁵⁰

The Implementation Rules of 1985 do not impose any particular conditions in respect of the nature of the representatives who may or may not be lawyers. Besides, these Rules do not require that the representatives should have special certificates such as *Shari'ah* or legal certificates.

⁵⁰ The Arbitral Award No. 11/1407, dated 16/08/1407. A.H. (1987 A.D.).

5.6 The sessions; administration and record

There are many administrative aspects which should be arranged by the arbitral tribunal, and the parties to the dispute and their representatives during the sessions of the arbitration.

5.6.1 Dates of the sessions

The sole or presiding arbitrator usually fixes the date or dates of the sessions after consultation with his fellow arbitrators, the parties to the dispute and their representatives. He should take into consideration some issues when fixing the date of the session, such as the holiday periods of the other arbitrators and the parties to the dispute. The ICSID Arbitration Rules, for instance, adopt this rule where they state that:

- “ (1)- The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. In both cases, the parties shall be consulted as far as possible.
- (2)- The dates of subsequent session shall be determined by the Tribunal, after consultation with the Secretary-General and with the parties as far as possible.”⁵¹

5.6.2 Basic principles

There are some basic principles which should be respected during the sessions, for instance, the arbitral tribunal must treat each party to the dispute equally and give him the full opportunity to present his case during the arbitration

⁵¹ The ICSID Arbitration Rules, Art. 13.

proceedings. Moreover, the sessions should be held in camera before the arbitral tribunal unless the parties to the dispute agree otherwise. The arbitral process is a private matter and the arbitral tribunal does not allow any third party to be present at the sessions unless he has an interest or relation in the dispute; for example, when he attends as a witness. Thus, under the ICC Arbitration Rules, a third person should not attend the hearings unless produces relevant documents concerning the dispute or is a witness.

5.6.3 Functions of the chairman of the arbitral tribunal

The chairman of the arbitral tribunal usually performs many essential functions during the sessions. The most important functions can be summarised as follows:

- The presiding arbitrator determines an appropriate place in which the sessions are held. It is an advantage if this place contains relevant facilities such as enough rooms for the arbitral tribunal and the parties to the dispute.

- He determines the issues which will be discussed in the sessions after consultation with the other arbitrators and the parties to the dispute.

- He divides the time of the session equally between the parties to the dispute.

- He administers and controls the sessions. The chairman and his fellow arbitrators have the power to question the parties to the dispute and witnesses at hearings.

- He estimates the time required for the hearings and he allocates it equally between the parties to the dispute.⁵²

⁵² For further details, REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 241; also REYMOND, Claude., *The President of the Arbitral Tribunal*, 1994, vol. 9, no. 1, ICSID Review-Foreign Investment Law Journal, pp. 1-16.

5.6.4 Translation

Sometimes, one of the parties to the dispute or witnesses may not speak the official language of the arbitration proceedings. In this case, this party or witness has the right to speak at the sessions in his own language and a skilled translator will accompany him to translate his speech before the arbitral tribunal. The other party may also bring his own translator who will make sure that questions and answers are translated correctly. The arbitral tribunal may have its own translator who will resolve any differences arising out of the translation.⁵³

5.6.5 Transcripts of the sessions

The transcripts of the sessions can be taken. Legal writers differ in respect of the necessity of transcripts of the sessions but most legal writers think that it is important to take a verbatim transcript during the sessions, particularly in international commercial arbitration where arbitrators have different levels of comprehension of the language of the arbitration proceedings and also arbitrators from the civil law countries often rely on documentary rather than oral material.⁵⁴

However, certain legal writers think that the transcripts of the sessions are not necessary because the courts will not review the merits of the case and the verbatim transcripts may lead to increase in the expense of the arbitral process, but if one of the parties to the dispute wishes to record and transcribe the sessions he should pay for the cost of such record and transcripts.⁵⁵

The question which may arise is whether or not the arbitral tribunal has the power to compel the parties to the dispute to comply with its decision regarding the

⁵³ REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 243.

⁵⁴ *Ibid.*, p. 243.

⁵⁵ DOMKE, Martin., *Domke on Commercial Arbitration, revised edition by Gabriel M. WILNER*, New York, Publishing by Clark, Boardman & Callaghan, 1992, p. 386.

necessity of the transcripts of the sessions even if the parties do not prefer such issue.

Indeed, it is important that the parties to the dispute respect the decision of the arbitral tribunal concerning the necessity of the transcripts of the sessions because the refusal of the parties may lead to delay in the arbitral process and increase the expenses of the arbitration. Moreover, the arbitrators may not have clear knowledge in respect of all evidence, particularly oral evidence presented in the sessions when they reach the stage of the issue of the arbitral award. Consequently, the arbitral award may be challenged by one of the parties to the dispute because the arbitral tribunal has neglected oral evidence submitted to it during the arbitration proceedings.

There are two main methods of obtaining the transcripts. The first is to employ shorthand-writers to prepare a daily transcript. The arbitral tribunal should not employ a shorthand-writer unless the parties to the dispute consent. There are some advantages and disadvantages arising from the use of such method. For example, this method may save time and trouble in a long case.⁵⁶ However, it is expensive and insufficient in technical arbitration because technical terms and shop language used in this kind of arbitration can not be found in dictionaries and reference books.⁵⁷

The second method is to record the sessions and then transcribe them from tapes by an experienced typist or team of typists. Such method may save money but it may take a long time. In addition, it is possible to use modern methods of computer-aided transcription which can be less expensive than the previous methods.

⁵⁶ MUSTILL, Michael J. & BOYD, Stewart C., *The Law and Practice of Commercial Arbitration in England*, 1st Ed. , London, Butterworth & Co. Ltd, 1982, p. 316.

⁵⁷ DOMKE, Martin., *supra* note (55), pp. 386-87.

5.6.6 Secretary or registrar of arbitration

In *ad hoc* arbitration, the arbitral tribunal may appoint a secretary or registrar who acts as the link between the members of the arbitral tribunal, and the parties to the dispute and their representatives.

However, if the parties to the dispute do not wish to appoint a secretary or registrar, does the arbitral tribunal have the power to compel the parties to respect its decision regarding the necessity of the appointment of a secretary or a registrar?

In fact, there is not any reported case which may give a clear answer. However, it seems that if the arbitral tribunal decides that the appointment of a secretary or a registrar is necessary the parties to the dispute should respect such decision because the arbitral tribunal wishes that the arbitral process proceeds smoothly and effectively. Moreover, a secretary of arbitration usually performs important tasks as he takes care of the drafting of the minutes of the hearings, of the notices to the parties to the dispute and their representatives, and of the other administrative matters. He also collects advance payments from the parties to the dispute and puts in a special bank account which is opened on behalf of the arbitral tribunal, particularly in large and complex international commercial arbitrations.⁵⁸ The secretary of arbitration usually attends all the sessions held during the arbitration proceedings.

In institutional arbitration, there is less need for the appointment of a secretary or a registrar of arbitration because the secretariat of the arbitral institution usually acts as the secretary of the arbitration and also performs the most important administrative aspects concerning the arbitral process, such as the notification of the parties to the dispute and the collection of the fees and expenses of the arbitration.

⁵⁸ For further details, REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 247; also RUBINO-SAMMARTANO, Mauro., *supra* note (33), p. 324.

5.6.7 The position in the Kingdom of Saudi Arabia

The Implementation Rules of 1985 contain a series of particular provisions regarding the administration and record of the sessions of arbitration.

The arbitral tribunal should determine the date of the first session within five days of the date on which it receives the notification of the decision approving the arbitration instrument by the competent authority.⁵⁹

The sessions of the arbitration proceedings should be held in public by the arbitral tribunal, unless the tribunal decides by its own motion or at the request of either of the parties to the dispute that the sessions should be heard in camera for reasons accepted by the arbitral tribunal, such as the protection of the commercial reputation of the parties to the dispute.⁶⁰

In practice, only parties to the dispute can appear at the sessions because the arbitral tribunal does not permit third parties to attend the sessions, unless a third party has any relevant documents to produce or is a witness.

It is necessary that the arbitral tribunal treats the parties to the dispute equally and gives each one the full opportunity to present his arguments and evidence during the sessions.⁶¹

The Implementation Rules of 1985 give the chairman of the arbitral tribunal the power to control and administer the sessions and to put direct questions to the parties to the dispute and witnesses. The presiding arbitrator is empowered to exclude any person from the session when such person disrupts the proceedings. As well, each arbitrator has the right to question the parties to the dispute, their representatives and witnesses, and to discuss the aspects of the case with them through the presiding arbitrator.⁶²

⁵⁹ The Implementation Rules of 1985, Art. 10.

⁶⁰ Ibid., Art. 20.

⁶¹ Ibid., Art. 22.

⁶² Ibid., Art. 23.

Arabic is the official language to be used before the arbitral tribunal during the sessions. Any party or witness, who does not speak Arabic, should be accompanied by a sworn translator who will translate the speech of such party to the dispute or witness and sign with him the record of his oral argument in the minutes of the session.⁶³

In addition, The Implementation Rules of 1985 state that the clerk of the authority originally having jurisdiction over the dispute acts as the secretary of the arbitral process in which he will execute a number of functions during the arbitration proceedings. For example, he notifies the parties to the dispute of the date of the sessions and he also records in the minutes of the sessions all the facts and proceedings mentioned during the hearings.⁶⁴

In practice, the clerk of the competent authority does not perform any function during the arbitration proceedings. The secretary of arbitration in the Chambers of Commerce and Industry, where the arbitration usually takes place, acts as the clerk of the arbitral process instead of the clerk of the competent authority.⁶⁵ It is desirable that the Saudi legislator reviews the provisions of the Implementation Rules of 1985 and codifies the practical reality concerning the clerk of the arbitral process.

Minutes of the session should contain the date and place of the session, names of the arbitrators, the secretary and the parties to the dispute. They should also contain statements of the respective parties and they should be signed by the arbitrators and the secretary.⁶⁶

The Implementation Rules of 1985 do not specify any particular method to obtain the transcripts of hearings. Therefore, it is possible to use any method, such as the shorthand-writing method or the tape recording of the hearing method. In

⁶³ For further details in respect of such point, see above, pp. 205 *et esq.*

⁶⁴ The Implementation Rules of 1985, Art. 9.

⁶⁵ See above, p. 193.

⁶⁶ The Implementation Rules of 1985, Art. 27.

practice, the secretary of arbitration usually writes the minutes of each session by himself.

The Implementation Rules of 1985 permit the arbitral tribunal to postpone the session for a reasonable period on the basis of the request of one of the parties to the dispute for referring any effective documents, papers, or remarks on the subject-matter of the dispute.⁶⁷

Finally, it can be concluded from the foregoing provisions of the Implementation Rules of 1985 that the Saudi legislator attempts to resolve any difficulties or obstacles which may paralyse the arbitration proceedings, or delay such proceedings.

⁶⁷ Ibid., Art. 26.

5.7 Presence and absence of the parties

It is very important that the parties to the dispute or their representatives appear before the arbitral tribunal on the date of the session to hear the case. The parties to the dispute or their representatives usually submit statements, documents and evidence which support their claims to the arbitral tribunal.

If one of the parties to the dispute, almost always the respondent, fails to appear on the date of the hearing before the arbitral tribunal, the tribunal should make sure that he has been notified in person and the notice has duly reached him. If that party has not been notified in person the arbitral tribunal should postpone the hearing and notify that party of the date of the next hearing.

However, if that party has been notified in person and there is not any justifiable reason for his default, the arbitral tribunal can hold the hearing without his presence and accept oral or documentary evidence from the other party.

One legal writer thinks that it is highly desirable that the arbitral tribunal gives the defaulting party a further opportunity to appear before it even in the absence of sufficient cause for his default.⁶⁸ However, if such party refuses to attend the new hearing the arbitral tribunal should proceed with the arbitration proceedings and hear the other party, and then render the arbitral award.

Most international and institutional rules of arbitration confirm such rule. For example, the ICC Arbitration Rules provide that:

“ If one of the parties, although duly summoned, fails to appear, the arbitrator, if he is satisfied that the summons was duly received and the party is absent without valid excuse, shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been concluded in the presence of all parties.”⁶⁹

Besides, many national arbitration laws of different countries contain similar provisions such as Article 1040 of the Netherlands Arbitration Act of 1986.

⁶⁸ DAVID, René., *supra* note (22), p. 294.

⁶⁹ The ICC Arbitration Rules, Art. 15 (2).

The question which may arise is whether or not the absence of one of the parties to the dispute should lead the competent authority to directly render its award against the absent party without examining any evidence.

The competent authority, whether the court or the arbitral tribunal, should examine the statements, documents and evidence presented by the other party, and also make sure that such evidence is sufficient to render its award in favour of the present party.⁷⁰

5.7.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 is silent in respect of the presence and absence of the parties to the dispute during the arbitration proceedings. However, its Implementation Rules of 1985 contain several provisions which govern such aspect.

On the date of the hearing, the parties to the dispute should appear before the arbitral tribunal after receiving the notices of the secretary of arbitration which determine the date of the hearing. Each party presents his written statements, documents and evidence before the arbitral tribunal which will examine these statements and evidence and then hear the oral statements and witnesses of each party.

However, the hearings sometimes face obstacles which may cause the paralysis of the arbitration proceedings, such as the absence of one of the parties to the dispute during these proceedings.

In fact, if one of the parties to the dispute does not appear at the hearing the arbitral tribunal may hear the other party and decide the case, particularly when both parties have delivered their respective statements, defences and documents to the tribunal before the date of the hearing. In this case, the arbitral award is considered to have been made in the presence of the defaulting party. However, if the defaulting

⁷⁰ MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (56) p. 305.

party has not been notified in person the arbitral tribunal should postpone the hearing and notify him the date of the new hearing.

Moreover, an arbitral award is deemed to have been made in the presence of all the parties to the dispute if the party or his representative has appeared at any hearings or if he has submitted his statements or any documents relating to the case to the arbitral tribunal before the date of the hearing.

Besides, when there are several respondents and some of them have not appeared at the hearing the arbitral tribunal would adjourn the hearing to another date, especially when the arbitral tribunal finds that the absent parties have not been notified in person. The arbitral tribunal will also notify all the parties to the dispute by the secretary of arbitration the date of the new hearing and it will consider that the arbitral award has been rendered in the presence of all the parties whether they attend the hearing or not.⁷¹

In practice, such rules were applied to certain cases, such as the case of H. M. R. H. Co. for Trans. & Comm. (Commercial company) v. A. Co. for C. C. Ltd (Commercial company) where the arbitral award issued in this case was deemed in the presence of all the parties to the dispute, in spite of the refusal of one of the parties to participate in the hearings after the expiry of the time limits of the arbitration. The competent authority refused the request of this party to hear the case instead of the arbitral tribunal and this authority approved the decision of the arbitral tribunal which extended the time limits.⁷² Also, in the case of H. Co. for Comm. (Commercial & Contracting company) v. I. D. Co. (Contracting company), the arbitral tribunal adjourned one of the sessions to another date because one of the parties to the dispute did not attend at that session since he was ill.⁷³

⁷¹ The Implementation Rules of 1985, Art. 18.

⁷² The Arbitral Award issued on 19/05/1411A. H. (1991A. G.).

⁷³ The Arbitral Award issued on 02/06/1414A. H. (1994A. G.).

5.8 Amiable composition

Amiable composition is one of the methods of resolving disputes arising out of the performance of the contracts. In this method, the parties to the dispute give the arbitral tribunal the power to act as an amiable compositeur in their arbitration agreement. This power is usually granted to the arbitral tribunal, when the dispute relates to a long-term contract because the parties to the dispute wish to continue their commercial relationships in future.

There are several practical characteristics of amiable composition. For example, the amiable compositeur is not bound to comply with any law but he should apply the principles of equity and justice, and also the decision of the amiable compositeur is not subject to appeal.⁷⁴

The possibility of an arbitrator acting an amiable compositeur is explicitly recognised in many countries, particularly in civil law countries, such as Egypt,⁷⁵ and France. The French Code of Civil Procedure, for instance, provides that:

“The arbitrator is to decide the case in conformity with rules of law, unless the parties, in the arbitration agreement, have given him the authority to decide as amiable compositeur.”⁷⁶

In many common law countries, the arbitration laws often do not recognise expressly the institution of amiable composition because the arbitrators should apply a specific system of law to the case and they can not apply only the principles of equity and justice.⁷⁷ The new English Arbitration Act of 1996 expressly states the termination of the arbitration proceedings if the parties reach a settlement of the dispute.⁷⁸

⁷⁴ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 310.

⁷⁵ The new Egyptian Arbitration Act of 1994, Art. 39 (4).

⁷⁶ The French Code of Civil Procedure of 1980, Art. 1474.

⁷⁷ For further details, REDFERN, Alan & HUNTER, Martin., *supra* note (8), pp. 36-37.

⁷⁸ The new English Arbitration Act of 1996, Sec. 51.

Further, many international and institutional rules of arbitration contain provisions which recognise the right of the arbitrator to act as an amiable compositeur. For example, the UNCITRAL Arbitration Rules state that:

“ The arbitral tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.”⁷⁹

Such rule is also adopted by the ICC Arbitration Rules where they provide that:

“ The arbitrator shall assume the powers of an amiable compositeur if the parties have agreed to give him such powers.”⁸⁰

In international commercial arbitration, it is desirable to choose the place of arbitration, such as France where the applicable law permits the arbitrator to act as an amiable compositeur when the parties to the dispute wish to confer such power on the arbitrator.

5.8.1 The position in the Kingdom of Saudi Arabia

The concept of amiable composition is not known in the Saudi legal system because arbitrators should apply a specific law to the case. But, the arbitral tribunal often attempts to reach a settlement between the parties to the dispute during the arbitration proceedings. Each arbitrator firstly offers to the party who appointed him the settlement. If the parties to the dispute accept such offer they will attend at a special session with all the members of the arbitral tribunal to prepare the decision of

⁷⁹ The UNCITRAL Arbitration Rules, Art. 33 (2).

⁸⁰ The ICC Arbitration Rules, Art. 13 (4).

the settlement. Such decision must be rendered unanimously according to the Arbitration Regulation of 1983 which states that:

“ The decision of the arbitrators shall be taken by a majority vote but if they are authorised to reach a settlement, their decision shall be made unanimously.”⁸¹

However, if the parties to the dispute refuse the settlement, the arbitration proceedings will continue until the issue of the arbitral award by the arbitral tribunal.

The Implementation Rules of 1985 contain a provision relevant to settlement. It provides that:

“ At any stage of the proceedings, the parties may request the arbitral tribunal to record in the minutes that they have agreed on an acknowledgement, settlement, waiver or some other agreement. The arbitral tribunal must decide on this.”⁸²

It can be concluded that, according to such Rules, the arbitral tribunal only records the settlement between the parties to the dispute without participating with the parties in preparing the settlement. In fact, the arbitral tribunal, in practice, performs an important task in the process of the settlement between the parties to the dispute.

Moreover, there are many cases which were resolved by the settlement. The case of A. Co. (Contracting company) v. Sh. J. Co. for Ins. (Insurance company)⁸³ and the case of S. A. S. Co. for Agr. (Agriculture company) v. G. F. (Agriculture company)⁸⁴ are good examples.

⁸¹ The Arbitration Regulation of 1983, Art. 16.

⁸² The Implementation Rules of 1985, Art. 24.

⁸³ The Arbitral Award No. 5/1407, dated 11/04/1410A. H. (1990A. G.).

⁸⁴ The Arbitral Award No. 621/1407, dated 13/09/1412A. H. (1992A. G.).

5.9 Written statements

Written statements are one of the major methods which assist the arbitral tribunal to reach its award. Most aspects concerning the subject-matter of the dispute will be clarified by the written statements. Such statements usually contain the written pleadings of the dispute, the statements of evidence and the other documents concerning the dispute. The representatives of each party to the dispute usually submit these statements to the arbitral tribunal in support of their claims.

The first written statements submitted to the arbitral tribunal normally include the written pleadings, statements of evidence and the relevant documents. They are attached with the request for the arbitration by the claimant. Such statements set forth the subject-matter of the dispute and contain the relevant evidence and documents which support the claims of each party. After the commencement of arbitration, the parties to the dispute exchange some further written statements.

The arbitral tribunal often fixes time limits within which the written statements should be submitted to it by the parties to the dispute. However, if the parties need extra time the arbitral tribunal may allow them that. The UNCITRAL Arbitration Rules, for instance, provide that:

“ The period of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may justified.”⁸⁵

The arbitral tribunal has the jurisdiction to decide claims only mentioned in the written statements of the parties to the dispute. Therefore, the claimant needs to start a new arbitration for any claims which do not exist in the written statement accompanied to his request for the arbitration. This is particularly the case when the arbitral tribunal refuses to accept jurisdiction in respect of such claims.

⁸⁵ The UNCITRAL Arbitration Rules, Art. 23.

However, it is possible to amend the scope of the arbitration agreement and to bring these claims within the jurisdiction of the arbitral tribunal provided such amendment does not cause injustice to the other party.⁸⁶

It would be better that the arbitrators read in detail all written statements submitted by the parties to the dispute prior to the hearing in order that the arbitrators come to the hearing fully aware of the facts of the dispute, the statements of evidence and the documents submitted. This would save time.⁸⁷

There are certain methods for exchanging written statements. The main method is that the claimant first submits his written statement containing the request for the arbitration and the respondent will then answer and may file a counterclaim. After that, the claimant will submit a rejoinder and reply to the respondent's counterclaim, and so on until the end of the arbitration proceedings and the issue of the arbitral award.

However, the parties to the dispute will sometimes submit their written statements simultaneously, particularly when there is a disagreement between them in respect of which party will be considered the claimant. They then exchange further written statements containing statements of evidence in the subsequent sessions until the end of the arbitration proceedings.⁸⁸

Sometimes, the arbitral tribunal may request the parties to prepare further written statements containing evidence to answer questions which are not clarified in oral hearings or when the time limits of such hearings expire without giving the sufficient opportunity to the parties to cover all the arguments and claims of the case.

Besides, further written statements may be requested from the parties to the dispute when one of the parties produced fresh evidence or a new argument at the last oral hearing and the other party asks for an opportunity to respond.⁸⁹

⁸⁶ ROWLAND, Peter M. B., *Arbitration Law and Practice*, London, The Institute of Chartered Accountants in England and Wales in association with Sweet & Maxwell Ltd Publishers, 1988, p. 59.

⁸⁷ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), pp. 390-91.

⁸⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 321.

⁸⁹ *Ibid.*, p. 322.

The question which may arise is whether or not the arbitral tribunal can settle the case on the basis of the written statements which contain the written pleadings, the statements of evidence and the documents concerning the dispute without holding any oral hearing to hear the parties to the dispute and witnesses.

National arbitration laws of various countries differ in respect of the answer of such question. Certain national arbitration laws, such as the Belgian law, require that oral hearings must be held as one of the most important arbitration proceedings. However, most national arbitration laws of Latin America Countries, such as Ecuador and Venezuela, adopt that the arbitral tribunal may decide the dispute without holding any oral hearing to examine the parties to the dispute and their witnesses.⁹⁰

The arbitral tribunal may resolve the dispute without any oral hearings, if both parties to the dispute have agreed upon that. However, the arbitral tribunal is bound to organise oral hearings if one of the parties to the dispute requests that.⁹¹

In common law countries, it is less common that the parties to the dispute agree to settle the case without oral hearings because the appearance in person of the parties to the dispute and witnesses before the court and the process of the cross-examination have a great importance in the judicial system of common law countries.⁹²

5.9.1 The position in the Kingdom of Saudi Arabia

Written statements are one of the most important materials which assist the arbitral tribunal to decide the dispute submitted to it by the parties to the dispute. The arbitral tribunal gives the written statements containing written pleadings, statements

⁹⁰ For further details, DAVID, René., *supra* note (22), p. 295; also MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (56), pp. 262-63.

⁹¹ DAVID, René., *supra* note (22), p. 295.

⁹² MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (56), p. 263.

of evidence and documents regarding the dispute great importance when this tribunal considers its award, because such statements clarify the aspects of the dispute.

In practice, the parties to the dispute usually attach with their joint request for the arbitration written statements including statements of evidence and documents concerning the dispute which support the claims of each party. Moreover, the parties to the dispute exchange some further written statements after the arbitral tribunal determines the date of the first session and also in the subsequent sessions.

Moreover, each party to the dispute often presents his claims, defences, and evidence by written statements in each session until the end of the arbitration proceedings and the issue of the arbitral award by the arbitral tribunal.

The methods for exchanging the written statements is the normal method applied in other countries.⁹³

Before holding hearings, arbitrators usually read and study in details all written statements referred by both parties in order to come to hearings fully aware of the facts and evidence of both parties and that will save time for arbitrators and parties.

The question which may arise is whether or not arbitrators can decide the case according to written statements of the parties only without holding any oral hearings to hear the parties, their representatives and witnesses.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent with respect to this question. In practice, however, the arbitrators should hold oral hearings to hear the parties, their representatives and witnesses before making an arbitral award.

It would be better that the Saudi legislator deals with this question when it revises the current Regulation and Rules.

⁹³ See above, p. 225.

5.10 Evidence

The parties to the dispute support their claims and allegations by presenting statements of evidence to the arbitral tribunal which will then determine the disputed aspects of the facts on the basis of the evidence submitted by the parties.

The arbitral tribunal is usually exempted by the law itself or the agreement of the parties from the obligation to follow the legal rules of procedure and evidence which are applied by the courts.

However, there are some procedural principles which should be respected by the arbitral tribunal because these principles are fundamental to the administration of justice. For example, the arbitral tribunal must give each party to the dispute the full opportunity to present his case and the tribunal must also decide the case on the basis of its own view, and not on that of another person. If such fundamental principles are violated the arbitral award will be set aside.⁹⁴

There are many ways in which evidence may be taken in court proceedings. The present methods in common law systems vary from those used in civil law systems. In common law systems, each party to the dispute is entitled to present evidence which he considers important to prove his claims. The judge merely listens to such evidence. He may occasionally intervene, particularly when certain questions put to witnesses do not relate to the subject-matter of the dispute. The judge may also sometimes address a question to the witnesses. He will give his decision at the end of the proceedings.⁹⁵

In civil law systems, the judge participates in the administration of the proceedings and in the taking of evidence including the examination of the witnesses. In fact, the judge plays an important part in the conduct of the proceedings before giving his decision.⁹⁶

⁹⁴ DAVID, René., *supra* note (22), p. 291.

⁹⁵ RUBINO-SAMMARTINO, Mauro., *supra* note (33), p. 326.

⁹⁶ *Ibid.*, p. 370.

In international commercial arbitration, the evidence is presented according to the procedural rules of the law chosen by the parties to the dispute as the law governing the arbitration proceedings. In the absence of such choice, the arbitral tribunal has the power to establish these rules.

Sometimes, the arbitral tribunal may face certain difficulties in conducting the arbitration proceedings and taking evidence, particularly when the members of the arbitral tribunal and the parties to the dispute are from countries which apply different systems. In this case, however, the members of the arbitral tribunal may have the sufficient experience to deal with the arbitration proceedings and evidence.

Indeed, the parties to the dispute usually choose arbitrators who have sufficient knowledge and experience in respect of the subject-matter of the dispute, and the legal and judicial systems existing in the parties' countries.

The burden of proof usually rests with the party who makes a claim, or for that matter a counterclaim. The arbitral tribunal requires from each party to prove the facts of his claims or defence.⁹⁷ The UNCITRAL Arbitration Rules, for instance, confirm such rule where they provide that:

“ Each party shall have the burden of proving the facts relied on to support his claim or defence.”⁹⁸

The question which may arise is whether the evidence may be taken by one arbitrator instead of the other members of the arbitral tribunal.

In fact, the national arbitration laws of various countries, and international and institutional rules of arbitration do not have unanimous rules in respect of such matter. In France, the Court of Appeal in the case of *Société Arenelle v. Société Italo-Ecuadoriuna* held that it is possible for one of the members of the arbitral tribunal to conduct some of the arbitration proceedings alone without the other

⁹⁷ MARRIOTT, Arthur L., *Evidence in International Arbitration*, 1989, vol. 5, no. 3, International Arbitration, p. 282.

⁹⁸ The UNCITRAL Arbitration Rules, Art. 24 (1).

members of the arbitral tribunal.⁹⁹ However, some other countries will not allow the arbitral tribunal to delegate the taking of evidence to one of its members.¹⁰⁰

The LCIA Arbitration Rules adopt a flexible position in respect of this matter where they state that:

“ In the case of three-member tribunal, the Chairman may after consulting the other arbitrators, make procedural rulings alone.”¹⁰¹

There are a number of basic methods for taking evidence, and the most prominent methods for presenting evidence are as follows:

- The production of the documents.
- The testimony of the witnesses.
- The opinions of the experts.
- The inspection of the subject-matter of the dispute.

5.10.1 Production of the documents

Documents are one of the most important items of evidence to prove the facts of the case. Their production saves time and expense. Often, their weight is greater than other evidence offered at the arbitration.

There are two categories of documents. The first is the documents which are favourable to the party to the dispute and the second is those which are unfavourable. The party usually does not wish to produce the second category to the arbitral tribunal. However, he may be compelled to disclose all relevant documents, whether or not they are favourable to him.¹⁰²

⁹⁹ Sté Arenelle v. Sté Italo-Ecuatoriana case, Court of Appeal, Paris, dated 26/04/1985. Journal du Droit International (Clunet), vol. 113, 1986, pp. 175 *et esq.*

¹⁰⁰ For further details, RUBINO-SAMMARTINO, Mauro., *supra* note (33), p. 376.

¹⁰¹ The LCIA Arbitration Rules, Art. 5 (3).

¹⁰² REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 330.

There is a difference in the view and practice in respect of the production of the documents between common law countries and civil law countries. In many common law countries, the parties to the dispute are compelled to produce all relevant documents, but the scope of discovery of the documents in the arbitral process is left to the parties themselves who often determine that in the arbitration agreement.

However, in England, the professional duty requires the representatives of the parties to produce all relevant documents in their possession.¹⁰³ The new English Arbitration Act of 1996 explicitly gives the arbitral tribunal the power to order either party to the dispute to produce all relevant documents in his possession.¹⁰⁴

Moreover, the United States, the arbitral tribunal has the power to obtain all relevant documents and it can issue subpoenas to either party to produce the documents which are in his possession. In certain other countries, the arbitral tribunal does not have such power, but the court has the power to require the party to produce any document in his possession, when such document is relevant to the case.¹⁰⁵

In civil law countries, such as France and the Netherlands, the arbitral tribunal has the power to order the party to produce all relevant documents. However, it rarely uses such power because the parties to the dispute usually produce any relevant document concerning the dispute.¹⁰⁶

Moreover, many international and institutional rules of arbitration require that the parties to the dispute produce all relevant documents relating to the subject-matter of the dispute. For example, the AAA International Arbitration Rules provide that:

“ At any time during the proceedings, the arbitral tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or

¹⁰³ This information was given on the basis of a personal communication with my supervisor Professor John MURRAY.

¹⁰⁴ The new English Arbitration Act of 1996, Sec. 34 (d).

¹⁰⁵ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23). p. 398; also ROWLAND, Peter M. B., *supra* note (86), p. 54.

¹⁰⁶ For details, MARRIOTT, Arthur L., *supra* note (97), pp. 287-88.

appropriate.”¹⁰⁷

The Washington Convention of 1965 and the UNCITRAL Model Law of 1985 contain similar provisions which confirm the right of the arbitral tribunal to order the parties to produce any relevant documents regarding the dispute.¹⁰⁸

However, if the party to the dispute, who has the relevant documents in his possession, refuses and neglects the order of the arbitral tribunal to produce such documents, the tribunal can conclude that such documents are unfavourable to that party. It can also request the assistance of the competent authority, such as the courts which will compel that party to produce the document. For example, the Swiss Private International Law Act of 1987 provides that:

“ If the party so ordered does not comply voluntarily, the arbitral tribunal may request the assistance of the Court.”¹⁰⁹

The question which may arise is whether or not the arbitral tribunal has the power to order a third party to produce any relevant documents relating to the subject-matter of the dispute which are in his possession.

In many countries, such as England,¹¹⁰ the arbitral tribunal does not have the power to order a third party to produce documents, but in this case, the arbitral tribunal needs the assistance of the competent authority, such as the courts which can subpoena a third party to appear before the arbitral tribunal and produce any relevant documents in his possession.

In certain other countries, such as the United States,¹¹¹ the arbitral tribunal can order a third party to appear before it and to bring with him any relevant documents. However, if the third party refuses such order the arbitral tribunal can

¹⁰⁷ The AAA International Arbitration Rules, Art. 20 (3).

¹⁰⁸ The Washington Convention of 1965, Art. 43. Also the UNCITRAL Model Law of 1985, Art. 26.

¹⁰⁹ The Swiss Private International Law Code of 1987, Art. 183 (2).

¹¹⁰ The new English Arbitration Act of 1996, Sec. 43.

¹¹¹ The United States Federal Arbitration Act of 1925, Sec. 7.

annul the impact of such documents or it can request the assistance of the competent authority, such as the courts to compel this party to produce these documents.

5.10.2 Testimony of the witnesses

The testimony of the witnesses is the second main method of presenting evidence to the arbitral tribunal. The tribunal hears the parties to the dispute and witnesses to clarify the facts of the case and then to reach the arbitral award.

Most national arbitration laws of different countries expressly give the arbitral tribunal the power to hear witnesses during the arbitration proceedings. For example, the Netherlands Arbitration Act of 1986 states that:

“ The arbitral tribunal may, at the request of either party, allow a party to produce witnesses or experts.”¹¹²

Moreover, most international and institutional rules of arbitration explicitly provide for the right of the arbitral tribunal to hear the parties to the dispute and witnesses during the arbitration proceedings. For example, the ICC Arbitration Rules state that:

“ The arbitrator shall hear the parties together in person if one of them so requests; and failing such a request he may of his own motion decide to hear them. In addition, the arbitrator may decide to hear any person in the presence of the parties or in their absence provided they have been duly summoned.”¹¹³

The arbitral tribunal usually hears the witnesses after a series of exchanges of written pleadings and statements of evidence between the parties to the dispute. Consequently, the testimony of the witnesses does not often require long time

¹¹² The Netherlands Arbitration Act of 1986, Art. 1039 (3).

¹¹³ The ICC Arbitration Rules, Art. 14 (1).

because the arbitral tribunal has known the important points concerning the subject-matter of the dispute from the written statements containing the statements of evidence which were submitted by the parties before hearing witnesses. However, this does not mean that the testimony of the witnesses may not have significant impact.

In common law countries, such as England hearing the testimony of witnesses in court may take many weeks, sometimes months, in the court procedure. However, the period of the testimony in arbitration may be shorter because there is usually time limits within which the arbitral tribunal should make its award.¹¹⁴

The parties to the dispute and their representatives may consult with their witnesses in respect of the testimony presented before the arbitral tribunal. However, the arbitral tribunal has the right to prevent the witnesses from presence in the room, where the session is held, until the moment of their testimony because this will reduce the ability of the witnesses to adapt their testimony in light of the testimony of the other witnesses.¹¹⁵

The testimony of the witnesses in court in common law countries is administered by different methods to those applied in civil law countries. In common law countries, such as England and the United States, the witnesses are subject to examination-in-chief, cross-examination and re-examination by the parties' representatives, and the parties to the dispute can call as many witnesses as they like.¹¹⁶ Whilst in civil law countries, such as France, the witnesses are only examined by the judge himself.¹¹⁷

The arbitral tribunal can request any witness to attend the hearings and to give his testimony. Many national arbitration laws of various countries such as the Belgian

¹¹⁴ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 388.

¹¹⁵ *Ibid.*, p. 402.

¹¹⁶ LEW, Julian D. M., *Contemporary Problems in International Arbitration; in supplementary rules governing the presentation and reception of evidence in international commercial arbitration written by David W. SHENTON*, Dordrecht, Boston & Lancaster, Martinus Nijhoff Publishers, 1987, p. 193.

¹¹⁷ DAVID, René., *supra* note (22), p. 296.

law expressly or implicitly confer such power on the arbitral tribunal.¹¹⁸ As well, many international and institutional rules of arbitration such as the LCIA Arbitration Rules adopt the right of the arbitral tribunal to request any witness to appear at the hearing to give his testimony.¹¹⁹

If a witness refuses to comply with the order of the arbitral tribunal to appear at the hearing the competent authority, such as the court, at the request of the arbitral tribunal, will force him to attend at the hearing and to give his testimony. However, if he does not comply with the writ of this authority, he will be liable to be punished for contempt of the court, provided that he received the writ a specific time beforehand such as four days at least in England before the date on which his appearance before the arbitral tribunal is required.¹²⁰

The national arbitration laws of various countries differ in respect of the necessity to put the witnesses on oath. In common law countries, such as England, the arbitral tribunal has the power to examine the witnesses on oath, unless the arbitration agreement contains a contrary rule. The new English Arbitration Act of 1996, for instance, states that:

“The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.”¹²¹

In civil law countries, like Germany, the arbitral tribunal does not have the power to examine the witnesses under oath. The German Code of Civil Procedure, for instance, expressly provides that:

“Arbitrators may hear witnesses and experts who appear before them voluntarily. They are not authorised to administer the oath to witnesses or experts or parties.”¹²²

¹¹⁸ The Belgian Judicial Code, Art. 1696.

¹¹⁹ The LCIA Arbitration Rules, Art. 11.

¹²⁰ MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (56), p. 308.

¹²¹ The new English Arbitration Act of 1996, Sec. 38 (5).

¹²² The German Code of Civil Procedure, Art. 1035.

On the other hand, when a witness resides in a place outside the jurisdiction of the competent authority, such as the court of the country where the arbitration takes place, the arbitral tribunal will request the assistance of this authority to obtain the testimony of such witness. This authority will issue letters rogatory to a foreign court in whose jurisdiction that witness resides for obtaining his testimony. The Swiss Private International Law Act of 1987 states that:

“ Where the assistance of state authorities is needed for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court at the seat of the arbitral tribunal. Such court shall apply its own law.”¹²³

In practice, an arbitral tribunal seldom resorts to the letter rogatory procedure by requesting the competent authority, such as the court to issue it because such procedure may involve a long delay. Consequently, the arbitral tribunal may directly request the court within whose jurisdiction the witnesses reside to assist in taking the testimony or to order the production of documents to be used in arbitration without the need of a request from the competent authority, such as the court of the place of arbitration to issue court-to-court requests for co-operation. For example, a party to an ICC arbitration, held in Switzerland requested directly from a United States federal court the production of documents held by the defendant US company at its domicile within the court's jurisdiction.¹²⁴

Sometimes, certain countries give the arbitral tribunal sitting in other country the power to obtain the testimony of witnesses directly by one or more of its members or by a special examiner appointed by such arbitral tribunal without the need to issue letters rogatory from the competent authority, such as the court of the place of arbitration to the court within whose jurisdiction the witnesses reside.¹²⁵

¹²³ The Swiss Private International Law Act of 1987, Art. 184 (2).

¹²⁴ For details, CRAIG, W. Lurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 438.

¹²⁵ For details, MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (56), p. 309.

As well, the parties to the dispute may sometimes convert an oral testimony into written statements to be filed with other documents at the time of pre-hearing exchanges of evidence in order to save the time of arbitration. Such statements should be signed by the witnesses themselves.

Indeed, some international and institutional rules of arbitration explicitly recognise that matter. For example, the AAA International Arbitration Rules provide that:

“Evidence of witnesses may also be presented in the form of written statement signed by them.”¹²⁶

However, an arbitral tribunal often requires, in order to accept written statements of the witnesses, that such witnesses should be able to appear at the time of hearings at the request of the other party to the dispute and to answer questions concerning their testimony. In fact, the value of the written testimony will be reduced, if witnesses cannot attend before the arbitral tribunal.

The question which may arise here is whether or not the arbitral tribunal can hear the witnesses without one or both parties to the dispute attending the hearings.

Many countries, such as England and Switzerland require that all evidence, including the testimony of the witnesses, must be received by the arbitral tribunal in the presence of all the parties to the dispute except if any party is absent in default or has waived his right to be present. Other countries allow to the arbitral tribunal, in exceptional circumstances, to hear the witnesses in the absence of one or all parties to the dispute. However, minutes of the hearing must be communicated to the absent party or parties because the testimony of the witnesses may be subject to comment and question.¹²⁷

¹²⁶ The AAA International Arbitration Rules, Art. 21 (5).

¹²⁷ For further details, DAVID, René., *supra* note (22), p. 297.

5.10.3 Opinions of the experts

Opinions of the experts are the third main method of presenting evidence to the arbitral tribunal. The arbitral tribunal usually appoints experts to assist it to clarify the ambiguity arising out of the oral or written statements and documents presented by the parties to the dispute, particularly if issues of a technical or complex nature arise and the arbitrators do not have sufficient experience in respect of such issues. For example, the arbitral tribunal may need experts to determine the quality of soil or the material in construction projects.

Sometimes, the arbitration agreement contains an express provision which gives the arbitral tribunal the power to appoint experts. In the absence of this provision, the question may arise as to whether or not the arbitral tribunal has implied power to appoint experts, unless otherwise adopted in the law governing the arbitral process. In fact, it is difficult to find any objection to appoint experts, especially when the arbitral tribunal needs expert technical assistance in order to understand complex technical matters and then to reach a relevant decision.

However, the parties to the dispute may sometimes refuse to give the arbitral tribunal the power to appoint experts and they request from the arbitral tribunal to decide the case without the need for experts report because the appointment of experts may lead to increase in the expenses and time of the arbitration. In this case, the arbitral tribunal may resign, if it considers the appointment of experts is necessary.¹²⁸

On the other hand, many countries, such as the Netherlands give the arbitral tribunal the power to appoint experts, when it needs the assistance of such experts to set forth some technical matters concerning the dispute. For example, the Netherlands Arbitration Act of 1986 states that:

“ The arbitral tribunal may appoint one or more experts to give advice. The arbitral tribunal shall communicate as soon as possible to the parties a copy of the appointment and the terms of reference of the experts.”¹²⁹

¹²⁸ DAVIDSON, Fraser., *supra* note (25), pp. 134-35.

¹²⁹ The Netherlands Arbitration Act of 1986, Art. 1042 (1).

For example, in some countries, such as England the arbitral tribunal may, on its own motion, appoint experts to disclose their views of technical matters to the arbitral tribunal and the parties to the dispute, and invite the parties to address it thereon.¹³⁰ However, in the absence of the agreement of the parties to the dispute which gives the arbitral tribunal the power to appoint experts, it is uncertain in some countries whether the arbitral tribunal can appoint experts or not.¹³¹

Moreover, most international and institutional rules of arbitration, such as the AAA International Arbitration Rules and the LCIA Arbitration Rules¹³² explicitly give the arbitral tribunal the power to appoint experts to clarify any technical and complex matters regarding the subject-matter of the dispute, unless otherwise agreed by the parties. For example, the AAA International Arbitration Rules provide that:

“ The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.”¹³³

There are several methods by which an expert may be appointed. The arbitral tribunal may appoint an expert who is known to it or it may confer on the parties the opportunity to agree upon a neutral expert. In some cases, the tribunal may refer a list of experts to the parties to the dispute from which they choose specific experts and the arbitral tribunal may also choose specific experts from the list of experts submitted to it by the parties to the dispute.¹³⁴

¹³⁰ The new English Arbitration Act of 1996, Sec. 37 (1) a (i).

¹³¹ DAVID, René., *supra* note (22), p. 299.

¹³² The LCIA Arbitration Rules, Art. 12.

¹³³ The AAA International Arbitration Rules, Art. 23 (1).

¹³⁴ REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 340.

In addition, the arbitral tribunal may seek to have experts appointed under the ICC Rules for Technical Expertise, when the arbitral process is administered according to the ICC Arbitration Rules.¹³⁵

After the choice of an expert, such expert will immediately start his function to prepare a preliminary report and to present it to the arbitral tribunal. The tribunal often requires the parties to the dispute to co-operate with the expert and to give him any relevant information or documents for inspection.

The parties to the dispute are usually given the opportunity to comment on the preliminary report and each comment will be taken into consideration by the expert when he writes his final report. The final report is generally considered as a document with the other written evidence in the case, but the arbitral tribunal is not bound by such report.¹³⁶

The expert will participate in the oral hearing in order to answer any question presented by the parties to the dispute and to hear their comments. Some international and institutional rules of arbitration, such as the LCIA Arbitration Rules confirm that rule where they state that:

“ Unless otherwise agreed by the parties, if a party so request or if the Tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing at which the parties shall have the opportunity to question him, and to present expert witnesses in order to testify on the points at issue.”¹³⁷

5.10.4 Inspection of the subject-matter of the dispute

The fourth method of presenting evidence is that the arbitral tribunal itself inspects or visits the subject-matter of the dispute. In general, the arbitral tribunal has the power to inspect the site of the dispute, unless the parties have agreed to the

¹³⁵ For details, CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 415.

¹³⁶ RUBINO-SAMMARTINO, Mauro., *supra* note (33), p. 397.

¹³⁷ The LCIA Arbitration Rules, Art. 12 (2).

contrary. The arbitral tribunal particularly resorts to such method, when the dispute arises out of construction projects or the operation of industrial plants. As well, the tribunal may inspect the goods in commodity arbitration for determining the quality. The arbitral tribunal may use modern ways to inspect the site of the dispute such as photographs and videotape films.¹³⁸

Many national arbitration laws of various countries are silent in respect of the power of the arbitral tribunal to inspect any site or thing concerning the subject-matter of the dispute. However, such laws do not prohibit, in practice, the arbitral tribunal from inspecting the subject-matter of the dispute, if it considers the inspection is necessary on its own motion or if the parties to the dispute request it to do so.

Certain countries, such as England expressly give the arbitral tribunal the power to inspect the subject-matter of the dispute by itself or by an expert.¹³⁹

Moreover, many international and institutional rules of arbitration, such as the ICC Arbitration Rules are silent in respect of such matter, whereas some other rules, such as the LCIA Arbitration Rules¹⁴⁰ expressly give the arbitral tribunal the power to inspect the site of the dispute.

The arbitral tribunal must treat the parties to the dispute and their representatives equally, when it inspects the site of the dispute. The tribunal should take place the inspection in the presence of the parties to the dispute or their representatives. However, if the arbitral tribunal inspects the subject-matter of the dispute in the absence of one of the parties the arbitral award may be set aside.

The arbitral tribunal can put questions concerning the dispute to persons working on the site and the parties to the dispute or their representatives can also ask additional questions to those persons.¹⁴¹

¹³⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (8), pp. 342-43.

¹³⁹ The new English Arbitration Act of 1996, Sec. 38 (4) a.

¹⁴⁰ The LCIA Arbitration Rules, Art. 13: 1 (g).

¹⁴¹ REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 343.

5.10.5 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 recognise many procedural aspects in respect of evidence.

The arbitral tribunal should not follow the court procedure in respect of the taking of evidence. The tribunal must comply with all evidence procedure rules stated in the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

The arbitral tribunal may empower one of its members to take evidence presented by the parties to the dispute, such as some members of the arbitral tribunal may move to inspect the site of the dispute.

The Implementation Rules of 1985 recognise many methods by which the parties to the dispute can present the evidence which supports their claims and arguments. The most important methods are as follows:

- Production of the documents.
- Testimony of the witnesses.
- Opinions of the experts
- Inspection of the subject-matter of the dispute.

It is convenient to set forth these methods in detail according to the provisions of the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

5.10.5.1 Production of the documents

In general, each party to the dispute has the right to produce any relevant documents or evidence which support his claims. However, the party often does not produce the documents which are in his possession, if such documents are unfavourable to him. The arbitral tribunal has the power to order him, on its own initiative or at the request of the other party, to produce any relevant documents in his possession, particularly if such documents are effective.

The Implementation Rules of 1985 explicitly give this power to the arbitral tribunal, when the documents are necessary to the tribunal for understanding the subject-matter of the dispute. The Rules state that:

- “ The arbitral tribunal may upon either its own motion or the request of one of the parties, force the other party to present any document relevant to the case, where:
- a- The document is common to both parties. A document is deemed common to both parties if it has been drafted in the interest of both parties or if it proves their reciprocal rights and obligations.
 - b- The other party relied on this document at any stage during the proceedings.
 - c- The law so authorises.”¹⁴²

Moreover, the Implementation Rules of 1985 require that the request for production of the document should contain some information, such as a description of the document, its nature with any details, the facts which the document prove, and the evidence confirming that the other party has this document in his possession.

If the party to the dispute does not comply with the order of the arbitral tribunal to produce specific documents this tribunal can request the assistance of the authority originally having jurisdiction over the dispute to compel such party to produce these documents.

The Implementation Rules of 1985 are silent in respect of the ability of the arbitral tribunal to order a third party to produce any relevant documents concerning the dispute in his possession. In practice, the arbitral tribunal can request from a third party to do that. However, if he does not comply with the request the arbitral tribunal will resort to the competent authority which will force him to produce any relevant documents in his possession before the tribunal.

¹⁴² The Implementation Rules of 1985, Art. 28.

5.10.5.2 *Testimony of the witnesses*

The parties to the dispute have the right to ask the arbitral tribunal to hear their witnesses, but the parties should specify the subject-matter of the testimony and the points concerning the testimony. However, the parties to the dispute are not, in practice, obliged to prepare a special formal request which contains the facts to be presented by their witnesses. The Implementation Rules of 1985 provide that:

“ Any party which requests that a witness be heard must indicate either orally or in writing the facts to be established during the hearing. The party must be accompanied by the witnesses which it requests to be heard at such hearing.”¹⁴³

The arbitral tribunal usually fixes specific sessions to hear witnesses who will be examined and cross-examined by the parties to the dispute and their representatives, and the members of the arbitral tribunal.

In practice, the arbitral tribunal can summon the witnesses, on its own motion or at the request of one of the parties to the dispute, to hear their testimony. For example, in the case of S. B. Co. (Industrial company) v. I. A. Serv. Co. for Ins. (Insurance company),¹⁴⁴ the arbitral tribunal summoned a witness to hear his testimony on its own initiative, whilst in the case of Mr. N. A. A. R. (Saudi natural person) v. Y. Co. Ltd for Ins. (Insurance company),¹⁴⁵ the arbitral tribunal heard a witness at the request of the claimant.

If a witness refuses to comply with the order to appear at the hearing the arbitral tribunal can request the assistance of the competent authority which can force such witness to attend at the hearing and give his testimony.

The arbitral tribunal may allow the parties to the dispute to submit written testimonies signed by their witnesses, especially when such witnesses reside in

¹⁴³ Ibid., Art. 31.

¹⁴⁴ The Arbitral Award issued on 20/11/1410 A.H. (1990 A.D.).

¹⁴⁵ The Arbitral Award No. 2/1407, dated 20/04/1407 A.H. (1987 A.D.).

distant places in the Kingdom of Saudi Arabia or abroad. For example, in the case of N. I. Co. Ltd for Ins. (Insurance company) v. I. Co. for Ins. & Re-ins. (Insurance company),¹⁴⁶ the arbitral tribunal requested from a witness who resided in Jordan a written statement in respect of his testimony.

5.10.5.3 Opinions of the experts

The Implementation Rules of 1985 confer the power on the arbitral tribunal to appoint experts when some technical or complex issues arise out of the subject-matter of the dispute and the tribunal does not have the sufficient experience to deal with such issues. The arbitral tribunal should specify exactly the scope of the task of experts and the issues which will be examined.¹⁴⁷

Moreover, the arbitral tribunal should clarify in the decision of the appointment of experts which party pays the fees of experts. In practice, it is possible that one or both the parties to the dispute pays such fees. For example, the arbitral tribunal decided that the claimant should pay the fees of the expert who was appointed by it in the case of S. B. Co. (Industrial company) v. I. A. Serv. Co. for Ins. (Insurance company).¹⁴⁸

However, the arbitral tribunal often divides the fees of experts between the parties to the dispute. For example, in the case of H. B. Co. for Comm. (Commercial company) v. I. Co. for Comm. (Insurance company),¹⁴⁹ the arbitral tribunal divided the fees of the expert equally between the parties to the dispute.

The expert usually starts his mission without delay. He examines any relevant documents and asks the parties to the dispute to clarify any issue regarding the subject-matter of the dispute. When he finishes his mission he will submit a report to

¹⁴⁶ The Arbitral Award No. 13/1408, dated 16/02/1411 A.H. (1991 A.D.).

¹⁴⁷ The Implementation Rules of 1985, Art. 33.

¹⁴⁸ The Arbitral Award issued on 20/11/1410 A.H. (1990 A.D.).

¹⁴⁹ The Arbitral Award No. 14/1409, dated 01/09/1410 A.H. (1990 A.D.).

the arbitral tribunal which will send copies of such report to the parties to the dispute for their comments.

The arbitral tribunal holds a specific hearing to discuss the report with the expert and to give the parties the opportunity to comment on the report.¹⁵⁰

Either party to the dispute may sometimes submit a report made by experts appointed by him to the arbitral tribunal. This report will discuss the issues mentioned in the expert's report appointed by the arbitral tribunal and it may uphold or contradict with it.¹⁵¹

After discussing the report of the expert, the expert may present an additional report in order to fill gaps left in the first report. The arbitral tribunal is not necessarily bound by the conclusions mentioned in the report of the expert.¹⁵²

The Arbitration Regulation and its Implementation Rules do not contain any provision which provides for the duties of experts appointed by either party when they start their mission. However, they should give precise and neutral answers to the ambiguous technical issues of the dispute.

5.10.5.4 Inspection of the subject-matter of the dispute

The Implementation Rules of 1985 explicitly give the arbitral tribunal the power, on its own motion or at the request of one of the parties, to inspect the site or some other location relevant to the dispute in the presence of the parties to the dispute or their representatives. In this case, the arbitral tribunal should prepare minutes of the inspection proceedings.¹⁵³

In practice, there are several cases in which the arbitral tribunal inspected or visited the site of the dispute to examine some disputed issues arising from the case. For example, in the case of Mr. A. S. (Saudi natural person) v. S. Co. for Fin. Serv.

¹⁵⁰ The Implementation Rules of 1985, Art. 34.

¹⁵¹ Ibid., Art. 34. .

¹⁵² Ibid., Arts. 33 & 34.

¹⁵³ Ibid., Art. 35.

(Insurance company),¹⁵⁴ the arbitral tribunal visited the site of the dispute in the presence of the parties' representatives and the tribunal also put some questions to one of the persons working on the site.

Moreover, in the case of A. Co. for Comm. & Cont. (Commercial & contracting company) v. A. E. Co. (Electricity company),¹⁵⁵ the arbitral tribunal inspected the site of the dispute twice in the presence of the parties to the dispute. In the first visit, all the members of the arbitral tribunal moved to inspect the site whilst in the second time, the tribunal moved to the site without the presiding arbitrator who apologised because he is very busy.

In addition, in the case of Mr. N. A. A. R. (Saudi natural person) v. Y. Co. Ltd for Ins. (Insurance company),¹⁵⁶ the arbitral tribunal visited some rug and Jewellery shops for estimating the cost of the stolen insured rug and Jewellery.

The Implementation Rules of 1985 confer the power on the arbitral tribunal to adopt any procedure to obtain evidence which is useful to the arbitral process such as the hearing of a specific person or the questioning of one of the parties to the dispute, particularly when such procedure is effective in the case.

The arbitral tribunal may not carry out its order in respect of the taking of specific evidence procedure, provided that it sets forth the reasons therefor in the minutes of the session. The arbitral tribunal may also decline to take into consideration evidence produced by any procedure, provided it states the reasons therefor in the arbitral award.¹⁵⁷

Finally, it can be concluded that the Implementation Rules of 1985 give the arbitral tribunal wide powers to conduct the arbitration proceedings, especially in respect of the production of evidence. In fact, such matter assists the tribunal to administer the proceedings smoothly until the issue of the arbitral award.

¹⁵⁴ The Arbitral Award No. 5/1406, dated 15/02/1407 A.H. (1987 A.D.).

¹⁵⁵ The Arbitral Award No. 6, dated 19/10/1407 A.H. (1987 A.D.).

¹⁵⁶ The Arbitral Award No. 2/1407, dated 20/04/1407 A.H. (1987 A.D.).

¹⁵⁷ The Implementation Rules of 1985, Arts. 29 &30.

5.11 Hearings

This section is an attempt to clarify hearings, as one of the most important parts of the arbitration proceedings. It is convenient to discuss the aspects concerning hearings after the methods of producing evidence, which is usually examined during hearings, were clarified in the previous section.

It seems that although the written statements occupy great importance in the arbitral process the oral hearings also have substantial weight in most rules and laws governing arbitration.

Hearings take place at the request of either of the parties to the dispute or of the arbitral tribunal itself. Each party and his representative have the opportunity to present orally a summary of their statements and the arbitral tribunal has also the power to put questions to the parties and their representatives for clarifying some aspects mentioned in the written statements which are submitted by them.

In general, hearings are held at the place of arbitration. However, they may take place in other places, if there are justified reasons such as when an important witness resides at a distant place and he is unable to attend at the place of arbitration because he is very ill or busy.

It is difficult to make an accurate estimate of how long a hearing is likely to last. The length of time for hearing differs broadly. In common law countries, such as England hearings may last many weeks whereas in civil law countries, such as France hearings may take only three days or at the most five days.¹⁵⁸ However, the hearing should be adjourned if it can not be completed during the time allocated.

The parties to the dispute are often represented by counsel who will be a responsible for preparing and presenting all evidence including evidence of oral statements and witnesses. Also, each party has the right to appear at any hearing if he wishes. However, the arbitral tribunal may exclude him when he attempts to disrupt the course of the hearing or to make it impossible for the arbitral tribunal to

¹⁵⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (8), p. 349.

administer the hearing. In such case, the arbitral tribunal will consider him as being unwilling to participate in the hearing.¹⁵⁹

On the other hand, if one of the parties to the dispute, almost always the respondent, refuses to attend the hearing although he has been notified by a valid notice, the arbitral tribunal may proceed *ex parte* and hear the oral statements presented by the other party.

When the hearing starts each party to the dispute usually presents a brief opening statement in which he outlines the facts and claims of his case. Then, he presents both written and oral evidences which support his claims and arguments. The claimant and his witnesses are usually heard first by the arbitral tribunal and then the respondent and his witnesses.

In fact, it is unusual for the arbitration proceedings to be administered without at least a brief hearing. However, the arbitral tribunal may proceed to render the arbitral award without making any oral hearing, if the parties to the dispute have expressly so agreed.¹⁶⁰

5.11.1 The position in the Kingdom of Saudi Arabia

The arbitral tribunal has the power, at the request of one of the parties to the dispute or on its own initiative, to hold oral hearings and to put questions to the parties to the dispute and their witnesses in respect of some aspects regarding the subject-matter of the dispute.

The Implementation Rules of 1985 explicitly recognise such power to the arbitral tribunal where they state that:

“ The arbitral tribunal may examine the parties either upon its own motion or upon request of one of the parties.”¹⁶¹

¹⁵⁹ Ibid., p. 352.

¹⁶⁰ See above, p. 226.

¹⁶¹ The Implementation Rules of 1985, Art. 32.

In practice, the hearings usually take place at one of the Saudi Chambers of Commerce and Industry because these Chambers have appropriate rooms and comfortable facilities which assist the arbitral tribunal to proceed the hearings effectively and smoothly.

In general, the claimant and his representative start the hearing by outlining their claims and they then present an oral statement which upholds such claims and the written statements submitted to the arbitral tribunal before the hearing. In addition, they call their witnesses whom the arbitral tribunal will examine and the tribunal will give the respondent and his representative the opportunity to put questions to the witnesses.

After that, the respondent and his representative will present their oral statement which support their defence statements submitted to the arbitral tribunal before the hearing, and they then call witnesses to give testimony before the tribunal which will examine them and allow the claimant and his representative to put questions to such witnesses. In all cases, the respondent will be the last speaker in the hearing where the Implementation Rules of 1985 adopt that where they state that:

“ The defendant must be the last party to speak and thereafter the arbitral tribunal must complete the case and make a decision.”¹⁶²

Hearings are held after the exchange of the written statements between the parties to the dispute and after the arbitral tribunal examines such statements and has a sufficient knowledge in respect of the disputed aspects arising between the parties because such knowledge will reduce the time of the hearings.

In practice, there are many cases in which the arbitral tribunal examined and put questions to one or both the parties to the dispute on its own motion, such as the case of M. Sh. Co. for Comm. (Contracting company) v. A. Co. for T. Cont. (Contracting company)¹⁶³ and the case of Ind. G. Co. Ltd (Contracting company) v. Z. Co. (Contracting company).¹⁶⁴

¹⁶² The Implementation Rules of 1985, Art. 22.

¹⁶³ The Arbitral Award No. 2764/2K. 1409, dated 27/11/1410 A.H. (1990 A.D.).

5.12 Court Assistance

The competent authority, such as the court exercises important functions to assist the arbitral tribunal to operate the arbitral process effectively and smoothly, particularly during the arbitration proceedings. Moreover, the arbitral award is usually recognised and enforced by an order issued by the competent authority. Accordingly, the assistance of the courts of the country, where the arbitration takes place or where the award is to be enforced, is necessary.

The functions of the courts during the course of the arbitration proceedings may be classified in three categories as follows:¹⁶⁵

- Interim measures of protection.
- The supportive function.
- The supervisory function.

5.12.1 Interim measures of protection

In some cases, the need to issue interim measures of protection is necessary for preserving the subject-matter of the dispute from abuse by one of the parties to the dispute and for avoiding the prejudice which may befall the other party. For example, one of the parties to the dispute may be ordered to put perishable goods, such as fish, meat and tomatoes, in a freezer for their protection or to sell them.

In exceptional circumstances, the courts may issue, at the request of one of the parties to the dispute, interim measures of protection which are binding and enforceable, particularly when the arbitral tribunal has not been constituted yet and the other party, almost always the respondent, defaults or is uncooperative with that party, usually the claimant, in the arbitral process.

¹⁶⁴ The Arbitral Award No. 1870/1.K /1411, dated 12/09/1412 A.H. (1992 A.D.).

¹⁶⁵ For further details, REDFERN, Alan & HUNTER, Martin., *supra* note (8), pp. 306-11.

The parties to the dispute can confer the power on the arbitral tribunal to issue interim measures of protection. Many national arbitration laws of various countries, such as England¹⁶⁶ and Switzerland give such power to the arbitral tribunal. For example, the Swiss Private International Law Act of 1987 provides that:

“ Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures.”¹⁶⁷

Moreover, many international and institutional rules of arbitration and arbitration rules have similar provisions. For example, the UNCITRAL Arbitration Rules state that:

“ At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for conservation of the goods forming the subject-matter in the dispute, such as ordering their deposit with a third person or the sale of perishable goods.”¹⁶⁸

The parties to the dispute usually comply with the interim measures of protection issued by the arbitral tribunal because failure to do so is probably to be interpreted as an act of bad faith and influence the decision on the merits of the case.¹⁶⁹

However, if the party to dispute refuses to obey the interim measures of protection of the arbitral tribunal, the tribunal can request the assistance of the appropriate court which will compel such party to enforce such interim measures.

The arbitral tribunal often requests the assistance of the courts to issue interim measures of protection against a third party for the preservation of some aspects relating to the dispute, such as when the claimant wishes to obtain an interim

¹⁶⁶ The new English Arbitration Act of 1996, Sec. 39.

¹⁶⁷ The Swiss Private International Law Act of 1987, Art. 183 (1).

¹⁶⁸ The UNCITRAL Arbitration Rules, Art. 26 (1).

¹⁶⁹ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23), p. 416.

measure of protection where he presents it to the bank for freezing sums held in the bank account of the respondent.

In Switzerland, either party, if the parties to the dispute have agreed, can directly request the court to issue interim measures of protection of the subject-matter of the dispute without the need to ask the arbitral tribunal first to issue these interim measures of protection.¹⁷⁰

In addition, in many countries such as, Belgium, the court has the power to prevent the party to the dispute, almost always the respondent, from removing his assets from the place in which the arbitral award will be enforced by issuing interim measures which attach such assets.¹⁷¹

5.12.2 The supportive function

In general, the courts support may be sought at the outset of the arbitration proceedings to enforce the arbitration agreement or to establish the arbitral tribunal. Such support may also be sought during the course of proceedings. For example, when the arbitral tribunal requires the appearance of a third party to provide an effective evidence the court will order such third party to attend at the hearing. As well, the court's support may be required at the end of the arbitral process to recognise and enforce the arbitral award.

Most national arbitration laws of different countries, such as English law give the courts the power to support the arbitral tribunal, especially when the tribunal faces some obstacles. For example, where a third party refuses to produce some relevant documents concerning the subject-matter of the dispute or if a witness refuses to attend at the hearing. In this case, the courts will support the arbitral

¹⁷⁰ BLESSING, Marc., *The New International Arbitration Law in Switzerland*, 1988. vol. 5, Journal of International Arbitration, p. 49.

¹⁷¹ MATRAY, Lambert., *International Handbook on Commercial Arbitration, Belgium*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 12.

tribunal by compelling the refusing party to produce such documents or to appear before the arbitral tribunal.¹⁷²

Moreover, when the evidence exists in another place outside the jurisdiction of the arbitral tribunal, the courts will support the arbitral process where they will issue letters rogatory to foreign courts for taking such evidence.

5.12.3 The supervisory function

The supervisory function of the courts may be exercised during the arbitration proceedings when some emergency problems which are outside the jurisdiction of the arbitral tribunal arise, such as when there is clear evidence that one of the members of the arbitral tribunal has been bribed by one of the parties to the dispute. In this case, the other party can apply to the court to intervene and resolve such issue.

Moreover, the supervisory function of the courts may be involved where questions as to the refusal of recognition and enforcement of the arbitral award arise. Here, the courts may intervene and issue orders to recognise and enforce the arbitral awards.

The courts often avoid intervention in the arbitration proceedings when they feel that such intervention may prejudice the arbitral process.

In international commercial arbitration, it is desirable that the courts reduce their intervention during the arbitration proceedings. The parties to the dispute are usually recommended to choose a place of arbitration in countries whose courts are reluctant to intervene in the arbitral process.¹⁷³

¹⁷² The new English Arbitration Act of 1996, Sec. 43.

¹⁷³ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (23). p. 423.

5.12.4 The position in the Kingdom of Saudi Arabia

The competent authority, such as the Board of Grievances can assist the arbitral tribunal in the following instances:¹⁷⁴

5.12.4.1 *At the outset of the arbitration*

The arbitration agreement should be submitted by the parties to the dispute to the authority originally having jurisdiction over the dispute for its approval and then the arbitration proceedings will commence. The Arbitration Regulation of 1983 gives the competent authority the power to sanction and approve the arbitration instrument where it provides that:

“ The Authority originally competent to hear the dispute shall record the applications for arbitration submitted to it, and take a decision approving the arbitration instrument.”¹⁷⁵

The competent authority will intervene at the request of one of the parties to appoint the presiding arbitrator or the arbitrator of the defaulting party if the contract contains an arbitration clause. In practice, there are some cases in which the competent authority exercised such powers, such as the case of Mr. R. M. R. (Saudi natural person) v. S. A. R. Co. for Comm. (Contracting company) & R. H. Co. for Cont. (Contracting company) where the competent authority, which was the Board of Grievances, appointed the presiding arbitrator because the parties to the dispute were unable to agree upon him.¹⁷⁶

¹⁷⁴ SALEH, Samir., *Commercial Arbitration in the Arab Middle East*, London, Graham & Trotman, 1984, p. 316.

¹⁷⁵ The Arbitration Regulation of 1983, Art. 6.

¹⁷⁶ The Arbitral Award No. 1733/1 K / 1411, dated 25/09/1412 A.H. (1992 A.D.).

5.12.4.2 During the arbitration proceedings

In practice, the competent authority may assist the arbitral tribunal to eliminate any obstacles arising during the arbitration proceedings, such as when one of the parties to the dispute refuses to produce some relevant documents concerning the subject-matter of the dispute which are in his possession, or when a witness refuses to appear before the arbitral tribunal at the hearing.

Moreover, in some cases, the competent authority may intervene to investigate when one of the parties to the dispute alleges that the evidence presented by the other party is forged or when there is any criminal incident. In this case, the arbitral tribunal must suspend the arbitration proceedings until a final decision is made in respect of such aspects.¹⁷⁷

In respect of the interim measures of protection, the question arises whether or not the arbitral tribunal has the power to issue interim measures of protection of the subject-matter of the dispute, such as the sale of perishable goods.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent in respect of such question. However, some legal writers think that the arbitral tribunal may issue interim measures of protection during the arbitration proceedings, if the parties to the dispute expressly confer such power on it. They conclude that from the Arbitration Regulation of 1983 which states that:

“ All awards made by the arbitrators, even though they are issued in an investigation procedure, shall be filed within 5 days with the Authority having jurisdiction over the dispute.”¹⁷⁸

where they think that such provision may cover interim measures of protection, although the meaning of the phrase is not entirely clear.¹⁷⁹

¹⁷⁷ The Implementation Rules of 1985, Art. 37.

¹⁷⁸ The Arbitration Regulation of 1983, Art. 18.

¹⁷⁹ VAN DEN BERG, Albert Jan., *supra* note (36), p. 20.

They support their opinion on the basis that if the parties to the dispute have the right to bar the competent authority to decide the dispute when they submit their dispute to arbitration, then, *a fortiori*, they have the right to do so in respect of the issue of interim measures of protection when they give such power to the arbitral tribunal.¹⁸⁰

In fact, the Arbitration Regulation of 1983, not the parties to the dispute themselves, prohibits the competent authority from deciding the dispute, if the parties refer their dispute to the arbitration by the provision of Article 6 of the Regulation. Accordingly, the agreement of the parties to give the arbitral tribunal the power to issue interim measures of protection does not necessarily prevent the competent authority from issuing such measures because the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not bar the competent authority from such right.

In practice, it seems that the arbitral tribunal may issue interim measures of protection, if such measures are addressed to one or both the parties to the dispute. For example, the arbitral tribunal may issue interim measure for the sale of perishable goods which are in the possession of one of the parties to the dispute. if the other party requests from the tribunal to issue such measure.

However, it seems that if the interim measures of protection are addressed to a third party, such as the interim measure to the bank for freezing the sums existing in the bank account of one of the parties, the arbitral tribunal needs the assistance of the competent authority in respect of such matter.

5.12.4.3 At the end of the arbitration

According to the Arbitration Regulation of 1983, the arbitral award should be submitted within five days of the date of its issue to the competent authority for its approval.¹⁸¹

¹⁸⁰ EL-AHDAB, Abdul Hamid., *supra* note (29), p. 41.

¹⁸¹ The Arbitration Regulation of 1983, Art. 18. Also see for details in respect of the registration of the arbitral award below, pp. 307-09.

Moreover, if either party wishes to challenge the arbitral award he should submit the request for the challenge within fifteen days of the date of the issue of the award to the competent authority. The competent authority may refuse the challenge and it will then issue an enforcement order of the award or it may accept the challenge and it will then decide the dispute by itself..¹⁸²

¹⁸² Ibid., Arts. 18 & 19; for further details, see below, pp. 357-62.

5.13 Closure of the hearings

After concluding the oral arguments of the parties, the arbitral tribunal usually asks the parties to the dispute if they have any further evidence to be submitted or witnesses to be heard before it. If the parties to the dispute informed the arbitral tribunal that they presented all evidence and documents supporting their claims, the arbitral tribunal would declare the closure of the hearings and it would immediately proceed to deliberate and issue the arbitral award.

Many national arbitration laws of various countries give the arbitral tribunal the power to determine the date of closure of the hearings. For example, the French Code of Civil Procedure provides that:

“ The arbitrator shall fix the date upon which the matter shall reach the stage of deliberation.”¹⁸³

Many international and institutional rules of arbitration, such as the ICSID Arbitration Rules¹⁸⁴ contain similar provisions. The AAA International Arbitration Rules, for instance, state that:

“ After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the hearing closed.”¹⁸⁵

The arbitral tribunal has discretion to reopen the hearings at the request of one of the parties to the dispute who wishes to produce new evidence after the closure of the hearings and before the issue of the award, provided that such evidence is effective in the case and has a real weight. However, if the new evidence is valueless in the case the party presenting it may be obliged to pay any additional costs resulting from such evidence.

¹⁸³ The French Code of Civil Procedure of 1980, Art. 1468.

¹⁸⁴ The ICSID Arbitration Rules, Rule. 38.

¹⁸⁵ The AAA International Arbitration Rules, Art. 25 (1).

If the arbitral tribunal reopens the arbitration proceedings to hear a new evidence the other party to the dispute must be given the sufficient opportunity to reply and comment on such evidence. However, if the tribunal has ignored the right of such party and decided the case the arbitral award will be set aside.

Moreover, if the arbitral tribunal has accepted a new evidence submitted by one of the parties to the dispute after the closure of the hearings without reopening the hearings and giving the other party the opportunity to prepare his reply, the arbitral award will be set aside.¹⁸⁶

On the other hand, if new evidence appears after the issue of the arbitral award, the arbitral tribunal will have no power to take any action and the party seeking to rely on such evidence may apply to the competent authority, such as the court for an order that the award be remitted for a further hearing.¹⁸⁷

5.13.1 The position in the Kingdom of Saudi Arabia

The Implementation Rules of 1985 empower the arbitral tribunal to determine the date of the closure of the hearings. Before the closure of the hearings, the arbitral tribunal requests the parties to the dispute to present any further evidence, documents and witnesses. The arbitral tribunal may determine the date at which the award will be made, when it declares the closure of the hearings.¹⁸⁸

In addition, these Rules give the arbitral tribunal the power to reopen the hearing, if there are justified reasons presented before the issue of the arbitral award. The arbitral tribunal will decide whether the new evidence presented by one of the parties to the dispute is effective and useful for the case or not.

In practice, there are some cases in which the arbitral tribunal reopened the hearings at the request of one of the parties because he presented a new evidence or

¹⁸⁶ DOMKE, Martin., *supra* note (55), p. 384.

¹⁸⁷ MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (56), p. 315.

¹⁸⁸ The Implementation Rules of 1985, Art. 38.

document effecting in the case. The case of S. Co. for Cat. Tran. & Comm. (Commercial company) v. S. S. B. D. Co. (Italian maritime transport company)¹⁸⁹ and the case of Dr. H. B. A. (Saudi natural person) v. G. B. H. Co. Ltd (Private hospital)¹⁹⁰ are good examples.

After the closure of the hearing, it seems that the arbitral tribunal must not hear any comment or accept any documents from one of the parties to the dispute except in the presence of the other party. If the arbitral tribunal does not comply with such rule the arbitral award will be set aside.

As well, it seems that if either of the parties to the dispute presented to the arbitral tribunal a new evidence or document concerning the case after the issue of the arbitral award, the tribunal would refuse to examine this evidence because it has lost its jurisdiction after making the arbitral award, and it will ask the party to bring the new evidence before the competent authority such as the Board of Grievances which will examine it and then decide whether reopen the case or confirm the arbitral award.

¹⁸⁹ The Arbitral Award No. 954/1 K , dated 28/08/1414 A.H. (1994 A.D.).

¹⁹⁰ The Arbitral Award issued on 27/10/1411 A.H. (1991 A.D.).

Chapter six

The Arbitral Award

This chapter will deal with all matters regarding the arbitral award which determines the dispute between the parties.

The arbitral award is the decision of the arbitral tribunal on the dispute which had been referred to it by the parties, whether the arbitration stems from an arbitration clause or from a submission agreement. The function of the arbitral tribunal often terminates upon rendering the award, at least if it disposes of all aspects of the dispute.

This chapter will concentrate on the main issues relating to the arbitral award. It will be divided into several sections as follows:

- Making of the award.
- Types of the award.
- Form and contents of the award.
- Reasons for the award.
- Signature of the award.
- Registration and notification of the award.
- Correction and interpretation of the award.
- Finality of the award.

As usual, the chapter will firstly attempt to discuss the above issues in the national arbitration laws of various countries, and the international and institutional rules of arbitration. After that, it will set forth the position in the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

6.1 Making of the award

This section will discuss certain important aspects relating to the way in which the arbitral award is made. It will be divided into three sub-sections as follows:

- Deliberations.
- Majority vote.
- Time limits.

6.1.1 Deliberations

The arbitrators usually deliberate in private, and keep their deliberations and minutes secret. Certain national arbitration laws, such as the French law expressly state that deliberations must be secret.¹

Only members of the arbitral tribunal participate in deliberations and they keep the secrecy of deliberations until the arbitral award has been made and notified to the parties to the dispute.²

However, the secrecy of deliberations should continue until after the issue and notification of the arbitral award to the parties. The arbitral tribunal should not disclose anything discussed during the deliberations to any person, whether the parties to the dispute or a third party because disclosure of deliberations may lead to challenge of the arbitral award on the basis of some points arising in the deliberations. In addition, the members of the arbitral tribunal may not feel fully free to discuss the case, when they know that their discussion will be subject to disclosure to the parties or to a third party.

It is important that the arbitrators determine the date for their deliberations because no comments or documents may be presented to the arbitrators after such

¹ The French Code of Civil Procedure of 1980, Art. 1469.

² BAKER, Stewart A. & DAVIS, Mark D., *The UNCITRAL Arbitration Rules in Practice*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1992, p. 157.

date, unless the arbitration agreement or the applicable law of the arbitration provides otherwise. For example, the French Code of Civil Procedure states that:

“ The arbitrator shall fix the date upon which the matter shall reach the stage of deliberation. After this date, no claim may be made, nor any argument raised. No observation may be proffered, nor any document produced, except at the request of the arbitrator.”³

It is not necessary that deliberations take place at the place of arbitration, even though such deliberations will help the arbitrators to reach the arbitral award.⁴ However, it seems that the last deliberation, in which the award will be drawn up and signed by the arbitrators, should be held at the place of arbitration because many arbitration laws and rules require that the arbitrators should make the award at the country in which the arbitration takes place. For example, the LCIA Arbitration Rules provide that:

“ The Tribunal may hold hearings and meetings anywhere convenient, subject to the provisions of Article 10.2, and provided that the award shall be made at the place of arbitration.”⁵

Sometimes, it is possible that arbitrators make their award without necessarily being present at the same place where the award may be taken by telephone, telex or similar means of communications.⁶ Such position may apply in international commercial arbitration where the members of the arbitral tribunal are from different countries and live in distant places.

Some national arbitration laws of various countries, such as Belgian law⁷ explicitly state that all arbitrators must participate in the deliberations which will lead

³ The French Code of Civil Procedure of 1980, Art. 1468.

⁴ REDFERN, Alan & HUNTER, Martin., *Law and Practice of International Commercial Arbitration*, 2nd Ed., London, Sweet & Maxwell, 1991, p. 370.

⁵ The LCIA Arbitration Rules, Art. 7 (2).

⁶ DAVIDSON, Fraser., *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, Edinburgh, Scotland, W. Green, 1991, p. 156.

⁷ The Belgian Judicial Code, Art. 1701 (1).

to issue the arbitral award. Such rule may prevent the arbitral tribunal from making the award, particularly when an arbitrator refuses or fails to participate in deliberations.

It would probably be better to amend the rule which stipulates the necessity of the participation of all arbitrators, to one which only gives all arbitrators the opportunity to take part in deliberations because in this case, an arbitrator can not prevent the operation of the making of the award by his default in the participation in deliberations.⁸ In practice, when an arbitrator refuses to take part in deliberations the remaining arbitrators will proceed in his absence and issue the arbitral award.

If an arbitrator does not attend one of the deliberations the remaining arbitrators should make sure of the reasons for his absence before they proceed to deliberate and make the award because the absence of such arbitrator may be temporary or resulting from justified reasons such as illness. In this case, the remaining arbitrators may also adjourn the deliberations to another time to give the absent arbitrator the opportunity to attend such deliberations after the disappearance of such reasons.

In deliberations, the chairman of the arbitral tribunal often prepares and submits a draft award to his fellow arbitrators after all arbitrators have agreed upon the major issues of the dispute in the first deliberations. The party-appointed arbitrators will then discuss the draft with the chairman and they may modify it by preparing substitute drafts on some issues of the dispute. After that, the chairman of the tribunal will draft a composite award.

In international commercial arbitration, the chairman of the arbitral tribunal may sometimes have difficulty in drafting the award in the official language of the arbitration during the deliberations. In such case, the arbitrators may agree that one of the party-appointed arbitrators will initially draft the award and submit it to the other arbitrators for their agreements on its terms.⁹

⁸ DAVIDSON, Fraser., *supra* note (6), p. 156.

⁹ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *International Chamber of Commerce Arbitration*, 2nd Ed. , New York, London & Rome Oceana Publications. INC; and Paris, ICC Publishing S. A., 1991, p. 330.

In some countries, such as Egypt, the silence of the arbitration laws in respect of the necessity of the making of the award after deliberations conducted in the manner determined by the arbitral tribunal, may mean that the award must mention how the deliberations were made, in presence of all arbitrators and in one of several meetings.¹⁰

6.1.1.1 The position in the Kingdom of Saudi Arabia

Although the Arbitration Regulation of 1983 is silent in respect of deliberations, its Implementation Rules of 1985 contain a provision which requires that deliberations should take place in secret and only members of the arbitral tribunal should participate in such deliberations. The Implementation Rules also state that deliberations should only be held collectively by the members of the arbitral tribunal.¹¹

In such case, the question may arise in respect of the ability of the other arbitrators to hold deliberations when an arbitrator refuses to participate in such deliberations.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent in respect of such matter. However, it seems that if an arbitrator refuses or fails to participate in deliberations without any justified reasons, the other arbitrators may proceed to hold deliberations and make the arbitral award. They should also set forth the refusal of such arbitrator in the arbitral award.

In practice, all the arbitrators usually participate in deliberations, even if one of them does not agree with the opinions of the other arbitrators. This arbitrator can annex his dissenting opinions to the arbitral award. For example, in the case of N. Co. for Adm. & Ltd Serv. (Services company) v. S. Co. Ltd (Maintenance company)

¹⁰ EL-AHDAB, Abdul Hamid., *The New Egyptian Arbitration Act in Civil and Commercial Matters*, June 1995, vol. 12, no. 2, Journal of International Arbitration, p. 87.

¹¹ The Implementation Rules of 1985, Art. 38.

where an arbitrator annexed his dissenting opinions in a separate document to the arbitral award.¹²

6.1.2 Majority vote

Three-member arbitral tribunals may make the arbitral award unanimously or by a majority of votes, or sometimes by the chairman of the arbitral tribunal alone when he is conferred such power to decide the award by the agreement of the parties to the dispute or by the applicable law of the arbitration.

A few countries, such as Venezuela require in their arbitration laws that the arbitral award should be made by the unanimous decision of the members of the arbitral tribunal.¹³ In fact, recognition and enforcement of the arbitral award may be easier when it is made by the unanimity of the arbitrators. However, the stipulation of the unanimity of arbitrators may lead to the paralysis of the arbitral process when an arbitrator refuses or fails to agree with the other arbitrators upon a specific award. Moreover, this stipulation may alienate the parties from settling their dispute by arbitration because it may require more time and expenses.

Most countries, such as France¹⁴ and the Netherlands expressly or implicitly provide that the arbitral award may be made by the majority of votes. For example, the Netherlands Arbitration Act of 1986 explicitly states that:

“ Unless the parties have agreed otherwise, if the arbitral tribunal is composed of more than one arbitrator, it shall decide by a majority of votes.”¹⁵

¹² The Arbitral Award No. 1107/1/k 1408, dated 22/08/1410 A.H. (1990 A.D.).

¹³ DAVID, René., *Arbitration in International Trade*, Deventer, The Netherlands. Kluwer Law & Taxation Publishers, 1985, p. 315.

¹⁴ The French Code of Civil Procedure, Art. 1470.

¹⁵ The Netherlands Arbitration Act of 1986, Art. 1057 (1).

Moreover, most international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules¹⁶ and the LCIA Arbitration Rules¹⁷ expressly provide that the arbitral award may be made by a majority of the arbitrators. The ICSID Arbitration Rules, for instance, state that:

“Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.”¹⁸

The dispute submitted to the arbitration may contain a number of issues which require to be resolved by the members of the arbitral tribunal. The arbitrators may sometimes decide some of such issues unanimously, whereas the other issues may be settled by the majority of votes. In this case, the arbitral award as a whole will usually be rendered by the majority of the arbitrators.

The question which may arise, when there is not a majority vote to make the award, is whether the presiding arbitrator will be given the decisive vote to decide the award.

Indeed, the arbitral tribunal is bound to issue an award which will resolve the dispute referred to it by the parties. Accordingly, it is unacceptable that the tribunal says that it is unable to render an arbitral award.

If a majority vote cannot be reached in respect of the issue of an arbitral award certain countries, such as Belgium, Greece¹⁹ and Switzerland give the chairman of the arbitral tribunal the power to make the award alone. The Swiss Private International Law Act of 1987, for instance, provides that:

“In the absence of such agreement, the arbitral award shall be rendered by a majority decision, or, in the absence of a majority, by the presiding arbitrator alone.”²⁰

¹⁶ The UNCITRAL Model Law of 1985, Art. 29.

¹⁷ The LCIA Arbitration Rules, Art. 16 (3).

¹⁸ The ICSID Arbitration Rules, Rule, 16 (1).

¹⁹ RUBINO-SAMMARTANO, Mauro., *International Arbitration Law*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1990, p. 428.

²⁰ The Swiss Private International Law Act of 1987, Art. 189 (2).

Some institutional rules of arbitration, such as the ICC Arbitration Rules and the LCIA Arbitration Rules²¹ explicitly give the presiding arbitrator the power to decide the dispute alone, when the members of the arbitral tribunal do not reach a majority vote. For example, the ICC Arbitration Rules state that:

“ When three arbitrators have been appointed, the award is given by a majority decision. If there is no majority, the award shall be made by the chairman of the arbitral tribunal alone.”²²

The UNCITRAL Arbitration Rules give the presiding arbitrator the power to decide only the questions of the procedure alone.²³ However, there are issues which the arbitral tribunal may sometimes find it difficult to decide whether they are procedural or substantive.

In fact, only two cases have been resolved by the chairman of the arbitral tribunal alone because there was not a majority vote in the entire history of the ICC.²⁴

The ability of the presiding arbitrator to make the award alone, when there is not a majority vote, may prevent the paralysis of the arbitral process and it may also save time and expenses of the arbitration.

It may be cheaper and more practicable to appoint a sole arbitrator from the beginning of the arbitration where he will decide the dispute and make the arbitral award.²⁵

Many legal writers have considered and discussed this matter and they gave some suggestions for settling the problem when there is not a majority decision.²⁶ It

²¹ The LCIA Arbitration Rules, Art. 16 (3).

²² The ICC Arbitration Rules, Art. 19.

²³ The UNCITRAL Arbitration Rules, Art. 31 (2).

²⁴ DAVIDSON, Fraser., *supra* note (6), p. 154. I failed to find any official source containing new cases had been decided by the presiding arbitrator alone according to the ICC Arbitration Rules.

²⁵ *Ibid.*, p. 154.

²⁶ For further details BAKER, Stewart A. & DAVIS, Mark D., *supra* note (2), p. 152; DAVID, René., *supra* note (13), pp. 315-16; see also DAVIDSON, Fraser., *supra* note (6),

is possible to submit the dispute to a neutral arbitrator who will make the award, or the members of the arbitral tribunal may inform the competent authority which will then have to nominate a new arbitrator to decide the dispute. However, such suggestions require more expense and more time contrary to the main aim of arbitration.

After the stage of deliberations, it would be better that the arbitral tribunal informs the parties to the dispute of the fact of non-agreement upon a specific award and asks them to attempt to settle this position by making a compromise. But, if the parties do not resolve such deadlock, they can decide at that stage to confer upon the presiding arbitrator the power to make the award alone.

6.1.2.1 The position in the Kingdom of Saudi Arabia

The arbitral award is usually made by the unanimous decision of the arbitrators, or by the majority vote when the members of the arbitral tribunal are unable to agree upon a specific award. The Arbitration Regulation of 1983 and its Implementation Rules of 1985 expressly confirm such rule and also require the unanimity of all the arbitrators when they are empowered to reach a settlement. Article 16 of the Arbitration Regulation states that:

“ The decision of the arbitrators shall be taken by a majority vote but if they are authorised to reach a compromise solution, their decision shall be made unanimously.”

The majority vote is required in all kinds of arbitration, whether an ad hoc arbitration or an institutional arbitration administered by one of the Saudi Chambers of Commerce and Industry.²⁷

p. 154.

²⁷ The Arbitration Regulation of 1983, Art. 16; also the Implementation Rules of the Chambers of Commerce and Industry Regulation of 1981, Art. 53.

Moreover, it seems that the same rule are applied to international commercial arbitration held in the Kingdom of Saudi Arabia.

The authority originally having jurisdiction over the dispute, such as the Board of Grievances will make sure, when it renders an order to enforce the arbitral award, that the members of the arbitral tribunal have respected the provisions of the Arbitration Regulation and its Implementation Rules in respect of the making of the arbitral award by the majority vote.

The question which may arise, when there is not a majority vote, is whether the presiding arbitrator has the power to issue the award alone.

The Arbitration Regulation and its Implementation Rules do not contain any provision in respect of such question. One legal writer suggests that the deliberations should continue between all the arbitrators until they or their majority reach a decision.²⁸

It is rare for the arbitrators not to reach a majority vote to make the arbitral award. It seems that if there is no majority vote the presiding arbitrator does not have the power to decide the dispute alone. However, in such case, the arbitrators usually inform the competent authority which will deal with the situation. It may ask the arbitrators to review their opinions and attempt to reach a majority vote, or it may confer on the presiding arbitrator the power to make the arbitral award or it may decide the dispute by itself.

In practice, most arbitral awards are made the arbitrators unanimously. However, there are certain cases which were resolved by a majority vote. For example, the case of R. R. Co. (Subcontracting company) v. A. C. C. Co. for Ltd Cont. (Korean construction company)²⁹ and also the case of H. M. R. H. Co. for Trans. & Comm. (Commercial company) v. A. Co. for Ltd Cem. & Comm. (Commercial company).³⁰

²⁸ SĀLIM, Ṣalāḥ., *Dirāsah Kānūniyyah li Niẓām al-Taḥkīm fī al-Mamlakah al-‘Arabiyyah al-Sa‘ūdiyyah (Legal Study for the Arbitration Regulation in the Kingdom of Saudi Arabia)*, Riyadh, The Kingdom of Saudi Arabia, Published by the Riyadh Chamber of Commerce and Industry, Undated, p. 53.

²⁹ The Arbitral Award No. 4/1408, dated 13/08/1408 A.H. (1988 A.D.).

³⁰ The Arbitral Award, issued 19/05/1411 A.H. (1991 A.D.).

On the other hand, in the case of A. Co. for Dev. (Construction company) v. Mr. S. A. H. (Saudi natural person)³¹ which contained several disputed issues, the arbitrators resolved some of such issues unanimously, whereas the other issues were decided by majority vote. The arbitral award of this Case was considered to be made by majority vote.

6.1.3 Time limits

In general, the parties to dispute have the right to determine a specific time limit within which the arbitral award should be rendered by the arbitral tribunal. However, if they do not insert any specific time limit in the arbitration agreement, whether an arbitration clause or a submission agreement, the time limit specified in the applicable law of the arbitration proceedings will be considered the time limit of the arbitration.

The national arbitration laws of various countries differ the length of the time limit. English law does not determine any specific time limit for making the arbitral award but leaves that to the parties and the members of the arbitral tribunal. However, it is important that the arbitrators use all reasonable despatch to make the award. If the time limit for making the arbitral award has expired before rendering the award the High Court has the power to extend the time limit at the request of the parties to the dispute or the arbitral tribunal.³²

In Sweden, the courts have the power to issue orders directing the arbitrators to make their arbitral awards within a reasonable time, when the arbitral process does not seem to be proceeding with due diligence.³³

In the United States, the Federal Arbitration Act of 1925 contains no provisions regarding the time limit within which the arbitral award should be made.

³¹ The Arbitral Award, issued 27/05/1414 A.H. (1994 A.D.).

³² The new English Arbitration Act of 1996, Sec. 50.

³³ Stockholm Chamber of Commerce., *Arbitration in Sweden*, Stockholm, Sweden. 1977, p. 115.

However, some States in the United States provide that the arbitral award should be made within thirty days from the date on which the hearings are closed.³⁴

The French law specifies six months as a time limit within which the arbitral award should be rendered by the arbitrators, if the parties to the dispute do not agree upon a specific contractual time limit in the arbitration agreement. The French Code of Civil Procedure states that:

“ If the arbitration agreement does not establish a deadline, the mission of the arbitrators shall last only six months from the day the last arbitrator has accepted his mission.”³⁵

On the other hand, if the arbitral process administered under institutional arbitrations, some institutional rules of arbitration determine a specific time limit within which the award should be issued. For example, the ICC Arbitration Rules state that:

“ The time-limit which the arbitrator must render his award is fixed at six months.”³⁶

The Commercial Arbitration Rules of AAA provide that:

“ The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearing or, if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.”³⁷

The determination of the time limit aims to ensure that the claims are made whilst events are fresh in the minds of the parties and to reduce the time and expenses of the arbitral process.³⁸ Some documents and evidence concerning the

³⁴ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 391.

³⁵ The French Code of Civil Procedure of 1980, Art. 1456.

³⁶ The ICC Arbitration Rules, Art. 18 (1).

³⁷ The Commercial Arbitration Rules of AAA, Art. 41.

³⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 192.

subject-matter of the dispute may be lost and some witnesses may also move to distant places outside the jurisdiction of the arbitral tribunal and the court of the place of arbitration.

However, although the determination of a mandatory time limit, within which the arbitral award should be made, may assist to resolve the dispute without delay, it may raise some difficulties and awkward consequences. For example, the arbitral tribunal may make the award which complies with the time limits without giving the parties an appropriate opportunity to present their claims. The award may, in such case, be set aside on the basis that the arbitral tribunal did not respect a fundamental principle. Therefore, the arbitral process may require more time and money to issue a new award.

Some legal writers think that it is desirable that no time limit for making the arbitral award is determined in the arbitration agreement, whether an arbitration clause or a submission agreement, but if it is necessary to do so under the applicable law, the time limit should if possible be related to the closure of the hearings.³⁹

The time limit is suspended where an incidental procedure is required, such as the request for challenge of one of the arbitrators during the arbitration proceedings, or where the parties to the dispute dismiss one of the arbitrators and so on.⁴⁰

In practice, the time limit for making of the arbitral award may be extended by the mutual agreement of the parties or by the arbitral tribunal itself at the request of the parties, if they are unable to agree upon another specific time limit. Moreover, the court may extend the time limit at the request of one of the parties or of the arbitral tribunal.

Most national arbitration laws of various countries, such as the French law, give the parties the right to extend the time limit, if the arbitral tribunal considers that to be necessary. The court may also extend such time limit at the request of one of

³⁹ Ibid., p. 393.

⁴⁰ MATRAY, Lambert., *International Handbook on Commercial Arbitration, Belgium*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 14.

the parties or of the arbitral tribunal. For example, The French Code of Civil Procedure provides that:

“ The legal or contractual deadline may be extended either by agreement of the parties or, by a request of either of them or of the arbitral tribunal, by the President of the *Tribunal de Grande Instance*. ”⁴¹

In institutional arbitrations, the parties to the dispute can generally extend the time limit by their mutual agreement. However, if they are unable to agree upon another specific time limit, the institutional rules of arbitration differ in respect of the authority which has the right to make such extension. Some institutional rules of arbitration, such as the ICC Arbitration Rules explicitly give such right to the ICC's Court of Arbitration. These Rules state that:

“ The Court (ICC International Court of Arbitration), pursuant to a reasoned request from the arbitrator or if need be on its own initiative, extend this time-limit if it decides it is necessary to do so. ”⁴²

Indeed, the Secretariat of the ICC International Court of Arbitration usually follows the calendar for each arbitration. It will contact the presiding arbitrator before the end of the time limit of arbitration for making a timely request to extension which is submitted to the ICC International Court of Arbitration.

The ICC International Court of Arbitration generally grants three-months extensions. However, it may give six-months extensions, when the arbitrator provides a clear and convincing time schedule. In very exceptional cases, the ICC International Court of Arbitration may agree to give twelve-months extension where all arbitrators and parties apply in writing with explanation of the need for such a long extension.⁴³

⁴¹ The French Code of Civil Procedure of 1980, Art. 1456.

⁴² The ICC Arbitration Rules, Art. 18 (2).

⁴³ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), pp. 318-19.

Some other institutional rules of arbitration, such as the ICSID Arbitration Rules, give the right to extend the time limit to the arbitral tribunal itself. Such Rules provide that:

“ The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.”⁴⁴

When the time limit expires without making an arbitral award, the arbitration proceedings will end and the competent authority, such as the courts can not restart the arbitral process, if it is not empowered by the applicable law of the arbitration to do so.⁴⁵ Consequently, it is important that the parties to the dispute decide to extend the time limit or to request it from the competent authority, if they are unable to agree upon a specific time limit, to specify a new time limit before the expiry of the original time limit. In this case, the decision of the extension of the time limit may be made before or after the expiry of the original time limit.

The competent authority, such as the courts usually extends the time limit within which the arbitral award will be made. The length of the extended time limit depends on the justifications presented by the parties to the dispute or by the arbitrators. For example, the new English Arbitration Act of 1996 states that:

“ The Court may extend the time (time for making an award) for such period and on such terms as it thinks fit.”⁴⁶

The question which may arise is whether or not the arbitral award will be invalid when made after the expiry of the time limit of the arbitration.

Some countries, such as Belgium provide that the arbitral award issued after the time limit has expired, could be set aside because the arbitrator loses his jurisdiction and mission after the expiry of the time limit of the arbitration.⁴⁷

⁴⁴ The ICSID Arbitration Rules, Art. 26 (2).

⁴⁵ EL-AHDAB, Abdul Hamid., *Commercial Arbitration with the Arab Countries*, London, Graham & Trotman, 1990, p. 94.

⁴⁶ The new Arbitration Act of 1996, Sec. 50 (4).

⁴⁷ MATRAY, Lambert., *supra* note (40), p. 14.

However, some other countries, such as the United States hold that it is not necessary that the arbitral award is invalid if it is rendered after the expiry of the time specified in the arbitration agreement. The court may uphold such awards on the basis that no objection to the delay has been made prior to the issue of the award or there is no showing that actual harm to the losing party was caused by the delay.⁴⁸

6.1.3.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 confers the right on the parties to the dispute to determine the time limit within which the arbitral award should be made by the arbitral tribunal. However, if they are unable to agree upon a specific time limit the Regulation decides that the time limit will be ninety days from the date on which the arbitration instrument was approved by the competent authority.⁴⁹

If the parties to the dispute have agreed in the arbitration agreement that the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 will be the applicable law of the arbitration proceedings, the time limit for making the award will be three calendar months from the date of the first session.⁵⁰ In fact, there is a slight difference in the length of the time limit between the two Regulations.

Before the expiry of the time limit, the parties to the dispute have the right to extend the original time limit. The Arbitration Regulation of 1983 gives the arbitral tribunal the right to extend the time limit, if the tribunal considers that necessary and it should issue a reasoned decision in order to justify such extension.

The agreement of the parties or the decision of the arbitral tribunal in respect of the extension of the original time limit must be before the expiry of such time limit because if the time limit expires before doing that the arbitration proceedings would

⁴⁸ MACNEIL, Ian R. , SPEIDEL, Richard E. & STIPANOWICH, Thomas J., *Federal Arbitration Law*, vol. III, Boston, The United States, Little, Brown & Company Publishers, 1994, pp. 37:19-37:21.

⁴⁹ The Arbitration Regulation of 1983, Art. 9.

⁵⁰ The Implementation Rules of the Chambers of Commerce and Industry Regulation. Art. 53.

end, and the arbitrators would lose the right to extend the time limit in such case. As well, the parties to the dispute would not be able to extend the time limit in this case because they would lose their right to make such extension.⁵¹

The question may arise of the validity of the arbitral award issued after the expiry of the time limit of the arbitration.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent in respect of such matter. However, it seems that the validity of such award will depend on the decision of the competent authority where it may set aside the arbitral award and decide the dispute, or it may accept such award and extend the time limit to a date following the date on which such award has been made. The circumstances and reasons presented by the arbitral tribunal will affect the decision of the competent authority in such case.

On the other hand, if the time limit expires without issuing the arbitral award the parties to the dispute will resort to the competent authority. In this case, the competent authority has two alternatives. It may either decide the dispute or extend the time limit of the arbitration.⁵² However, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 have not determined a specific time limit within which the competent authority should decide between the two alternatives.

In practice, the competent authority extends the time limit of the arbitration on the basis that the arbitral tribunal has a good knowledge in respect of the dispute and this will save time and money of the parties to the dispute. There are many cases, such as the case of M. Sh. Co. for Comm. (Contracting company) v. A. Co. for T. Cont. (Contracting company)⁵³ in which the arbitral tribunal informed the parties to the dispute that the time limit would expire and it is necessary to extend it. The parties usually agree upon such extension.

⁵¹ EL-AHDAB, Abdul Hamid., *Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985*, 1986, vol. 3, no. 6, Part 2, Journal of International Arbitration, p. 30.

⁵² The Arbitration Regulation of 1983, Art. 9.

⁵³ The Arbitral Award No. 2764/2 k. 1409, dated 27/11/1410 A.H. (1990 A.D.).

In many cases, the Arbitration Regulation of 1983 extends the original time limit of the arbitration by an extra thirty days, such as when one of the parties to the dispute dies during the arbitration proceedings and also when one of the arbitrators is dismissed by the mutual agreement of the parties.⁵⁴

The Implementation Rules of 1985 determine certain cases in which the time limit of the arbitration will be suspended by the arbitral tribunal. For example, when the competent authority intervenes to investigate the allegations presented by one of the parties that some documents or evidence submitted by the other party are forged or when there is a criminal incident during the arbitration proceedings.⁵⁵

⁵⁴ The Arbitration Regulation of 1983, Arts. 13 & 14.

⁵⁵ The Implementation Rules of 1985, Art. 27.

6.2 Types of the arbitral award

There are different types of arbitral awards which may be made during the arbitral process. These types may dispose of one or more of the issues concerning the subject-matter of the dispute, such as the determination of the applicable law of the arbitration.

It would be better to determine all issues and decide all claims in a single award. However, certain issues of the dispute, such as the scope of the arbitral tribunal's jurisdiction may need to be decided prior to making a final award at the end of the arbitral process.

This section will deal with the major types of the arbitral awards which may be rendered during the arbitral process. Such types will be treated as follows:

- Interim and partial awards.
- Final award.
- Additional award.
- Other awards.

6.2.1 Interim and partial awards

It is difficult to make a clear distinction between interim awards and partial awards. The terms interim and partial are sometimes used interchangeably. For example, the ICC Arbitration Rules require the approval of the ICC's Court of Arbitration to be given to awards whether partial or definitive and the word "partial" in this context includes awards which could be referred to as interim awards when they are issued in the English language.⁵⁶

However, interim awards usually decide only procedural and other preliminary issues, such as the scope of jurisdiction of the arbitral tribunal, whereas

⁵⁶ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 380.

partial awards usually deal with substantive issues of the dispute, such as a sum of money which should be paid from one party to the other.⁵⁷

This sub-section will set forth the two types of the arbitral award and it will be divided as follows:

- Interim award.
- Partial award.

6.2.1.1 Interim award

Sometimes, there are one or more issues of the dispute which may require to be determined in the preliminary stages of the arbitral process. In this case, the competent authority, such as the courts, or the arbitral tribunal will decide such issues by making interim awards.

The power of the arbitral tribunal to make interim awards may derive from the arbitration agreement, whether an arbitration clause or a submission agreement, or from the applicable law of the arbitration. For example, the arbitral tribunal may issue an interim award to settle a plea that it does not have the jurisdiction to decide some issues of the dispute, or it may make an interim award to determine how the case would proceed when the parties are unable to agree upon the procedural law of the arbitration, and the law of the place of arbitration permits the arbitral tribunal to decide such matter.

Some national arbitration laws, such as the English⁵⁸ and Dutch laws explicitly give the arbitral tribunal the power to make interim awards. For example, the Netherlands Arbitration Act of 1986 provides that:

“ The arbitral tribunal may render a final award, a partial final award, or an interim award.”⁵⁹

⁵⁷ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), pp. 322-23.

⁵⁸ The new English Arbitration Act of 1996, Sec. 39.

⁵⁹ The Netherlands Arbitration Act of 1986, Art. 1049.

Some other laws of various countries, such as the United States laws do not contain any provision which relates to the issue of interim awards by the arbitral tribunal. However, in practice, it is not unusual for the arbitral tribunal to make interim awards on preliminary matters, such as whether or not a claim is barred because it was made too late to the arbitration.⁶⁰

In addition, the UNCITRAL Arbitration Rules expressly contain a provision for making interim awards by the arbitral tribunal during the course of the arbitration. Such Rules state that:

“ In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.”⁶¹

The ICC Arbitration Rules are less explicit in respect of the possibility of making interim awards by the arbitral tribunal. However, in practice, interim awards are often made in ICC arbitrations by the arbitral tribunal, especially where jurisdiction of the arbitral tribunal is challenged or the proper law has to be determined.⁶²

Interim awards may save time and money of the parties to the dispute. However, the issue of interim awards may lead to intervention by the competent authority, such as the courts for judicial review, at the request of one of the parties to set aside such interim awards or to affirm them. Such intervention may delay the determination of the case and lengthen the period of the arbitration.

Interim awards are considered binding decisions between the parties on the issues with which they deal.⁶³ However, it may be possible to challenge interim awards. Certain arbitration laws give the parties the right to challenge interim awards after the issue of the final award which decides all issues of the dispute, unless the

⁶⁰ HOLTZMANN, Howard., *International Handbook on Commercial Arbitration, The United States*, Deventer, The Netherlands, Kluwer Law & Taxation, 1984, p. 20.

⁶¹ The UNCITRAL Arbitration Rules, Art. 32 (1).

⁶² REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 376.

⁶³ *Ibid.*, p. 360.

parties have agreed otherwise. The Netherlands Arbitration Act of 1986, for instance, provides that:

“ Unless the parties have agreed otherwise, an appeal to a secondary arbitral tribunal from an interim award can be lodged only in conjunction with an appeal from a final or partial final award.”⁶⁴

Certain other arbitration laws permit the parties to the dispute to challenge some interim awards issued by the arbitral tribunal before making a final award of the dispute. For example, the parties can challenge the interim award concerning the jurisdiction of the arbitral tribunal before the competent authority within a specific time limit from the date of the notification of such award. The UNCITRAL Model Law of 1985 recognises such rule where it states that:

“ If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter.”⁶⁵

In fact, giving to the arbitral tribunal the power to make interim awards will assist to prevent the paralysis of the arbitration and the arbitral process will proceed quickly and smoothly.

6.2.1.2 Partial award

A partial award is usually used to dispose one or more substantive issues of the dispute, such as a sum of money which it is indisputably due and payable by one party to the other.⁶⁶

The power of the arbitral tribunal to issue partial awards is usually conferred in the arbitration agreement or by the law governing the arbitral process. Some

⁶⁴ The Netherlands Arbitration Act of 1986, Art. 1050 (3).

⁶⁵ The UNCITRAL Model Law of 1985, Art. 16 (3).

⁶⁶ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 356.

national arbitration laws, such as Dutch⁶⁷ and English laws give the arbitral tribunal express power to make partial awards during the course of the arbitration. For example, the new English Arbitration Act of 1996 states that:

“ The arbitral may, in particular, make an award relating-
(b)- to a part only of the claims or cross-claims submitted to it for
decision.”⁶⁸

Some other national arbitration laws, such as the Japanese law allow the making of partial awards, only if the arbitration agreement, whether an arbitration clause or a submission agreement, explicitly provides for it.⁶⁹

Other national arbitration laws are silent in respect of the ability of the arbitral tribunal to issue partial awards. However, it seems that the arbitral tribunal may make partial awards to decide certain issues of the dispute at the request of one or both of the parties or at least the authority having competence to hear the dispute. such as the court may have the power to issue partial awards at the request of either party to the dispute.

In addition, many international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules⁷⁰ expressly confer the power to make partial awards on the arbitral tribunal. The LCIA Arbitration Rules, for instance, state that:

“ The Tribunal may make separate final awards on different issues at different times.”⁷¹

A partial award, like an interim award, is binding on the parties and it only disposes of the issues which it decides. However, the parties to the dispute can

⁶⁷ The Netherlands Arbitration Act of 1986, Art. 1049.

⁶⁸ The new English Arbitration Act of 1996, Sec. 47 (2) b.

⁶⁹ RUBINO-SAMMARTANO, Mauro., *supra* note (19), p. 408.

⁷⁰ The UNCITRAL Arbitration Rules, Art. 32 (1).

⁷¹ The LCIA Arbitration Rules, Art. 16 (6).

challenge partial awards only after the issue of a final award which decides all issues of the dispute. For example, the Netherlands Arbitration Act of 1986 provides that:

“ Unless the parties have agreed otherwise, an appeal to a second arbitral tribunal from a partial final award can be lodged only in conjunction with an appeal from the last final award.”⁷²

In Italy, it is impossible to challenge partial awards before making a final award which disposes of all issues of the dispute. The Court of Cassation has held that a partial award can not be challenged separately from the final award because if the appeal was decided and rejected before the arbitrators make a final award on all issues of the dispute, the final award issued after that would deal with only a part of the dispute and this conflicts with the arbitration agreement.⁷³

However, some contracts, such as construction contracts may contain various phases of disputes where each one may be decided by a partial final award before the issue of a final award disposing the remaining disputes. In this case, the question may arise of the possibility to enforce each partial final award immediately without waiting for making a final arbitral award deciding all the phases of disputes, especially if the reach to this award requires many years.

In fact, enforcement of partial final awards, in this case, will allow the main contract projects to go forward and it may benefit both parties to the dispute in the long run.⁷⁴

⁷² The Netherlands Arbitration Act of 1986, Art. 1050 (2).

⁷³ *Spa Terme di Santa Cesarea v. Spa Saverio Sticchi* case, Court of Cassation (Italy), 12/07/1979, *Giustizia Civile* (Italy) Massachusetts, p.1767, mentioned by RUBINO-SAMMARTANO, Mauro., *supra* note (19), p. 409.

⁷⁴ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), p. 325.

6.2.2 Final award

An award is final when the members of the arbitral tribunal decide all issues submitted to them by the parties to the dispute. It is important that the arbitrators do not render the final award until they have sufficient knowledge the issues of the dispute, the documents and evidence referred by the parties during the arbitration proceedings.

The issue of a final award usually leads to termination of the mission and jurisdiction of the arbitral tribunal in respect of the case. Also, the special relationship existing between the arbitrators and the parties ceases.

The final award is the natural result for the arbitral process. Many national arbitration laws of different countries, such as the Belgian and English⁷⁵ laws explicitly require that at the end of arbitration, a final award should be made by the arbitral tribunal to dispose of all issues of the dispute. The Belgian Judicial Code, for instance, provides that:

“Except where otherwise stipulated, an arbitral tribunal may make a final award in the form of one or more awards.”⁷⁶

The obvious distinction between the final award and other awards made during the arbitration proceedings, such as interim and partial awards is that the final award usually disposes all issues of the dispute submitted by the parties to the arbitral tribunal, whereas other types of awards only decide one or more issues of such dispute. Moreover, making of a final award may lead to end the arbitral process, whereas interim and partial awards are made during the arbitration proceedings and they do not lead to terminate the arbitration.

The final award will be discussed in details later on in this chapter when the finality of the award is discussed.⁷⁷

⁷⁵ The new English Arbitration Act of 1996, Sec. 58 (1).

⁷⁶ The Belgian Judicial Code, Art. 1699.

⁷⁷ See below, p. 333 *et esq.*

6.2.3 Additional award

Sometimes, one or more issues of the dispute is omitted from the final award made by the arbitral tribunal, such as the costs of arbitration or the fees of the arbitrators. In this case, the question may arise the ability of the arbitral tribunal to make additional awards to decide such omitted issues.

There are three tendencies with respect to such question. The first allows the arbitral tribunal to make an additional award inasmuch as the time limit of the arbitration has not expired. The French law follows this tendency.⁷⁸ In common law countries and Belgium, the arbitral tribunal has the power to make an additional award even after a period of the arbitration has expired.⁷⁹

Moreover, the UNCITRAL Model Law of 1985 explicitly gives the arbitral tribunal the power to issue an additional award within a specific time limit. It states that:

“ Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.”⁸⁰

The second tendency requires that the arbitral award issued in this case should be referred to the competent authority, such as the court which will decide whether or not this award is valid. After that, such authority may remit it to the arbitral tribunal and request from the arbitral tribunal to amend it and decide the omitted issues of the dispute; or the competent authority may submit the dispute to a new arbitral tribunal which will decide all the issues of the dispute anew. This practice is followed in Scotland in respect to domestic arbitration.⁸¹

⁷⁸ The French Code of Civil Procedure of 1980, Art. 1475.

⁷⁹ DAVID, René., *supra* note (13), p. 354.

⁸⁰ The UNCITRAL Model Law of 1985, Art. 33 (3).

⁸¹ This information was given on the basis of a personal communication with my supervisor Professor John MURRAY.

The last tendency does not allow the arbitral tribunal to issue an additional award because its award must be treated as the final step in the arbitration proceedings. Therefore, either party may require from the competent authority, such as the court to review the omitted issues of the dispute and to decide them. The Italian law follows such tendency on the basis that the arbitral tribunal loses its jurisdiction after issuing the final award in the case and it is impossible to reconvene the arbitral tribunal after it has made the final award.⁸²

6.2.4 Other awards

The arbitral tribunal may issue other types of awards which may assist to terminate the arbitral process. For example, the arbitral tribunal may make a consent award when the parties arrive at a settlement of their dispute during the arbitration proceedings and they may request from the arbitral tribunal to record such settlement in the form of an arbitral award.⁸³

The wish of the parties to continue their commercial relationships in future usually leads them to reach a consent award. A consent award may be preferred by the parties to the dispute when the dispute relates to a long-time contract between them.

In addition to such type of award, the arbitral tribunal may, in exceptional circumstances, make a default or an *ex parte* award when one of the parties fails or refuses to participate in the arbitration proceedings. In this case, it is necessary that the arbitral tribunal examines all claims and evidence presented by the active party before making its award. Moreover, it should make sure that the defaulting party, almost always the respondent, has been given a full opportunity to present his claims

⁸² RUBION-SAMMARTANO, Mauro., *supra* note (19), pp. 411-12.

⁸³ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 382.

and evidence before it. Finally, the arbitral tribunal makes a final award which will dispose of all issues of the dispute and end the arbitration proceedings.⁸⁴

6.2.5 The position in the Kingdom of Saudi Arabia

Before issue of the Arbitration Regulation of 1983, it was unclear whether the arbitral tribunal could make interim and partial awards in one or more issues of the dispute during the course of the arbitration.

However, the Arbitration Regulation of 1983 distinguishes between the different types of the arbitral awards. It states that:

“ All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them.”⁸⁵

According to this Article, the arbitral tribunal may make interim and partial awards to decide one or more issues of the dispute which may arise during the arbitration proceedings. As well, the tribunal will issue a final award which disposes of all issues of the dispute at the end of the arbitral process. However, it is important that the Saudi legislator explicitly gives the arbitral tribunal the right to issue interim, partial and additional awards during the arbitral process.

Both parties have the power to object any type of the arbitral awards made by the arbitral tribunal within fifteen days from the date on which such party has been notified such award after it was filed by the competent authority.⁸⁶ However, if the parties do not submit any objections against such award, the award will be final and

⁸⁴ Ibid., p. 381.

⁸⁵ The Arbitration Regulation of 1983, Art. 18.

⁸⁶ Ibid., Art. 18.

binding. The objection is usually brought to the authority originally having jurisdiction over the dispute which will decide it.

In practice, there are certain cases in which the arbitral tribunal made interim awards, such as the Case of A. Co. for M. Ind. (Industrial company) v. E. Co. (French industrial company)⁸⁷ where the arbitral tribunal issued an interim award which decided the request presented by one of the parties that the arbitral tribunal did not have the jurisdiction to determine the subject-matter of the dispute where it decided that it had the jurisdiction according to the arbitration agreement.

⁸⁷ The Arbitral Award No. 4/1411, dated 29/12/1412 A.H. (1992 A.D.).

6.3 Form and contents of the award

The issue of the arbitral award shows that the arbitrators have agreed to resolve all issues of the dispute submitted to them by the parties to the dispute.

It is necessary that the arbitral tribunal respects any requirements of form which are imposed by the arbitration agreement and the applicable law of the arbitration when the tribunal prepares and issues the arbitral award. The infringement of such requirements may lead to setting aside of the arbitral award.

Many national arbitration laws of various countries, such as the Egyptian,⁸⁸ English⁸⁹ and Dutch laws impose some requirements of form which must be respected when the arbitral award is made by the arbitrators. The Netherlands Arbitration Act of 1986, for instance, provides that:

“ The award shall be in writing and signed by the arbitrator or arbitrators.”⁹⁰

Many international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules⁹¹ and the AAA Arbitration Rules⁹² explicitly require several formalities in the form of the award. For example, the LCIA Arbitration Rules state that:

“ The Tribunal shall make its award in writing and, unless all the parties agree otherwise, shall state the reasons upon which its award is based. The award shall state its date and shall be signed by the arbitrator or arbitrators.”⁹³

⁸⁸ The new Egyptian Arbitration Act of 1994, Art. 43.

⁸⁹ The new English Arbitration Act of 1996, Sec. 52 (3).

⁹⁰ The Netherlands Arbitration Act of 1986, Art. 1057 (2).

⁹¹ The UNCITRAL Arbitration Rules, Art. 32.

⁹² The AAA Arbitration Rules, Art. 28.

⁹³ The LCIA Arbitration Rules, Art. 16 (1).

The ICC Arbitration Rules do not contain special requirements as to the form of the arbitral award. However, it is necessary that the arbitral tribunal and the ICC International Court of Arbitration check and respect any formal constraints required in the arbitration agreement, the law of the place of arbitration, and the law of the country in which recognition and enforcement of the award is sought.

Many national arbitration laws of different countries, such as the French⁹⁴ and Dutch⁹⁵ laws include some provisions which require further formalities. The Belgian Judicial Code, for example, states that:

- “ 5- An award shall, in addition to the operative part, contain the following particulars;
- a- the names and permanent addresses of the arbitrators;
 - b- the names and permanent addresses of the parties;
 - c- the subject-matter of the dispute;
 - d- the date on which the award was made;
 - e- the place of arbitration and the place where the award was made.
- 6- The reasons for an award shall be stated.”⁹⁶

Some institutional rules of arbitration contain similar provisions, such as Rule 47 (1, 2 &3) of the ICSID Arbitration Rules.

Certain legal writers think that the recognition and enforcement of the arbitral award will be facilitated where such award contains the following items:⁹⁷

- (1)- The names and addresses of the parties and where applicable of their representatives.
- (2)- The names and addresses of the arbitrators.
- (3)- The place of the arbitral award.

⁹⁴ The French Code of Civil Procedure of 1980, Art. 1472.

⁹⁵ The Netherlands Arbitration Act of 1986, Art. 1057.

⁹⁶ The Belgian Judicial Code, Art. 1702.

⁹⁷ ROWLAND, Peter M. B., *Arbitration Law and Practice*, London, The Institute of Chartered Accountants in England and Wales in association with Sweet & Maxwell Ltd Publishers, 1988, p. 77; also CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), pp. 326-27.

- (4)- A background note of the relationship between the parties out of which the dispute has arisen.
- (5)- Reference to the arbitration agreement and the appointment of the arbitrators.
- (6)- The main steps in the arbitration, with dates.
- (7)- A summary of the issues.
- (8)- Some references to the vital witnesses and evidence.
- (9)- The arbitrators' findings of fact.
- (10)- The conclusion of the arbitrators on any issues of law and their application to the facts found.
- (11)- The reasons upon which the award is based.
- (12)- Signature of the award by the arbitrators or majority with the date of the award.
- (13)- The award of the arbitrators includes decisions on interest and the costs of the reference.

It would be convenient to discuss the most important formalities imposed by many arbitration laws and rules.

6.3.1 Recitals

The arbitral award usually contains a brief description of the circumstances in which the dispute has arisen, the way in which the arbitral tribunal was established, the claims and arguments of the parties, and any specific procedure which may govern the arbitration.

These recitals will be useful for saving time when the competent authority, such as the court checks at the request of one of the parties to the dispute whether there was a valid arbitration agreement, whether the arbitrators were properly nominated, or whether the arbitrators did not exceed the scope of their jurisdiction and so on.⁹⁸

⁹⁸ DAVID, René., *supra* note (13), p. 316.

6.3.2 Language of the award

The arbitral award is usually made in the official language of the arbitration. However, if there is a mandatory rule in the applicable law of the arbitral process which requires that the arbitral award should be made in a specific language, such award must be rendered in such language.

Moreover, it is important to translate the arbitral award into the language of the country where the arbitration takes place, particularly when one of the parties challenges such award before the courts of this country, or when the arbitration law of this country requires that the arbitral award made in it should be deposited with its courts before issuing an order to enforce the award.

Under the New York Convention of 1958, a foreign arbitral award must be accompanied with an official translation into the language of the country in which the recognition and enforcement of such award is sought.⁹⁹

6.3.3 Award in writing

Many national arbitration laws of various countries require that an arbitral award must be made in writing. However, they do not stipulate any special form for such writing. For example, the Belgian Judicial Code expressly states that:

“ An award shall be set down in writing and signed by the arbitrators.”¹⁰⁰

Many international and institutional rules of arbitration require that the arbitral award should be in writing. The AAA Arbitration Rules, for instance, provide that:

⁹⁹ The New York Convention of 1958, Art. IV (2).

¹⁰⁰ The Belgian Judicial Code, Art. 1701 (4).

“ The award shall be in writing and shall be signed by a majority of the arbitrators.”¹⁰¹

The question which may arise is whether or not the arbitral award may be made orally by the arbitral tribunal.

If there is not any formal requirement as to the form of an arbitral award in the applicable law of the arbitral process a parol award may be valid unless the arbitration agreement otherwise provides. However, in practice, the arbitral award is usually made in writing and signed by the arbitrators.

It is difficult to make the arbitral award orally because the parties to the dispute usually need to resort to the competent authority, such as the court for issuing an order to enforce such award. In this case, the competent authority will require the award in writing since it will make sure that the arbitral tribunal has complied with the arbitration agreement and the applicable law of the arbitration before rendering an order to enforce the award.

6.3.4 Date and place of the award

It is very important that the arbitral tribunal indicates the date on which the award is made because the date makes it is possible to verify whether the award has been rendered within the time limit of the arbitration. The date, on which the arbitral award is notified to the parties to the dispute, will help to identify the outset of the time limit within which the award is submitted to the competent authority for enforcing or challenging it.

Also, the arbitral award usually mentions the place where it was made. The identity of the place of the award is important since it will set forth whether the arbitral tribunal has complied with the arbitration agreement in respect to such matter, and it will also identify the court which is competent in the event of challenge

¹⁰¹ The AAA Arbitration Rules, Art. 42.

against the award.¹⁰² Moreover, the identity of the place of the arbitral award will assist in facilitating the recognition and enforcement of this award because it sets forth whether or not the country in which the award has been made is a contracting country of the New York Convention of 1958.

Questions may arise in respect of the validity of the arbitral award where it does not indicate to the date and the place where it was made.

Indeed, the effects of the lack of such requirement depends on the law of the country in which such award was made and the law of the country where the recognition and enforcement of such award is sought. For example, in France the arbitral award will be under penalty of nullity if it does not indicate the date on which it was made.¹⁰³ Whereas in Belgium and common law countries a contrary solution prevails.¹⁰⁴

6.3.5 Reasons for the award

Reasons for an arbitral award may be required in the arbitration agreement or by the law applicable of the arbitration. In fact, many national arbitration laws of different countries, such as the Belgian¹⁰⁵ and French¹⁰⁶ laws explicitly state that the arbitral award should be reasoned. Some international and institutional rules of arbitration, such as the LCIA Arbitration Rules¹⁰⁷ require that the arbitrator sets forth the reasons upon which the award is based. However, in some other laws, such as the United States laws the arbitral tribunal has no obligation to mention the reasons for

¹⁰² RUBINO-SAMMARTANO, Mauro., *supra* note (19), p. 434.

¹⁰³ DAVID, René., *supra* note (13), p. 318.

¹⁰⁴ *Ibid.*, p. 318.

¹⁰⁵ The Belgian Judicial Code, Art. 1702 (6).

¹⁰⁶ The French Code of Civil Procedure of 1980, Art. 1471.

¹⁰⁷ The LCIA Arbitration Rules, Art. 16 (1).

the award, unless the arbitration agreement or the applicable law of the arbitration otherwise provides.¹⁰⁸

The reasons for the arbitral award will be discussed in detail later on in this chapter.¹⁰⁹

6.3.6 Signature of the award

Many national arbitration laws of various countries, such as the Belgian law and also some institutional rules of arbitration, like the AAA Arbitration Rules¹¹⁰ require that the arbitral award should be signed by all the arbitrators or by a majority, if an arbitrator refuses to sign. The Belgian Judicial Code states that:

“ An award shall be set down in writing and signed by the arbitrators. If one or more of the arbitrators are unable or unwilling to sign, the fact shall be recorded in the award. However, the award shall bear a number of signatures which is at least equal to a majority of the arbitrators.”¹¹¹

However, if the arbitral award has been issued without signatures of all the members of the arbitral tribunal it may be set aside according to some national arbitration laws of different countries, such as the Belgian and French laws.¹¹²

Certain aspects concerning the signature of the arbitral award will be treated later on in this chapter.¹¹³

¹⁰⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 390.

¹⁰⁹ For further details see below, pp. 300 *et esq.*

¹¹⁰ The AAA Arbitration Rules, Art. 28 (3).

¹¹¹ The Belgian Judicial Code, Art. 1701 (4).

¹¹² DAVID, René., *supra* note (13), p. 317.

¹¹³ For details see below, pp. 306 *et esq.*

6.3.7 Other requirements

Certain national arbitration laws impose some particular formalities. For example, the new Egyptian Arbitration Act of 1994 in its Article 43 (3) requires that the arbitral award must contain a copy of the agreement to arbitrate. If such requirement is not respected, the arbitral award may be set aside.

6.3.8 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 require that the arbitral tribunal has to respect some particular formalities when it makes the arbitral award.

The arbitral award should, according to Article 17 of the Arbitration Regulation and Article 41 of the Implementation Rules, contain the following requirements:

- 1- A copy of the arbitration instrument.
- 2- The names of the arbitrators.
- 3- The names of the parties, their occupations and domicile, and their appearance and absence during the arbitration proceedings.
- 4- The date and place of the award.
- 5- A summary of the parties' contention and a general review of the facts.
- 6- A summary of the parties' pleas and defences.
- 7- The reasons for rendering the award.
- 8- The text of the award.
- 9- The signatures of the arbitrators and the secretary of arbitration.

As well, the arbitral award should be in the Arabic language. It should be submitted within five days of its making to the authority originally having jurisdiction over the dispute for its approval.

It seems that the Saudi legislator aims, by requiring such formalities, to speed up enforcement of the arbitral award by issuing an order by the competent authority for the execution of such award because such formalities will help the competent authority to make sure that the arbitral tribunal has followed and respected the general principles of equity and the provisions of the applicable law of the arbitration.

The question may arise in respect of the effects when one of such formalities is not respected by the arbitral tribunal during the issue of the award.

In this case, the competent authority has two alternatives. It may remit the award to the arbitral tribunal to fulfil all requirements imposed by the Arbitration Regulation of 1983 and its Implementation Rules of 1985 or it may set aside the award and decide the case.

In practice, the arbitrators usually make sure, when they render the arbitral award that the award contains all formalities required by the Arbitration Regulation of 1983 and its Implementation Rules of 1985. However, if they omitted one of such formalities, the competent authority would choose one of the above alternatives according to the importance of the omitted requirements. For example, if the arbitrators did not set forth the reasons for the award and did not sign the award, the competent authority would set aside the award and decide the dispute.

However, if the arbitral award did not contain, for instance, a copy of the arbitration instrument, the competent authority would remit the award to the arbitrators and request the tribunal to accompany the award with such copy.

6.4 Reasons for the award

The reasons, upon which the arbitral award is based, are usually stated, unless the parties to the dispute have agreed otherwise. The giving of reasons for the award will improve the efficacy of the arbitral process, and the confidence of the parties to submit their dispute to arbitration.¹¹⁴ The statement of the reasons may make the parties settle any future similar disputes by themselves without resorting to the arbitration or the courts.¹¹⁵

On the other hand, some arbitral institutions, such as ICC publish many major arbitral awards issued in disputes administered according to the arbitration rules of these institutions. As well, there are certain arbitration journals, such as the Model Arbitration Law Quarterly which specialise in the publication of the most important arbitral awards made in international arbitration. In fact, this publication will make the business community aware about the arbitration as a means of resolving disputes.

Moreover, the reasons for the arbitral award will assist the competent authority, such as the court to understand the arbitral award, when one of the parties objects to the award and it will then eliminate any difficulties in respect to the enforcement of such award.

However, giving the reasons may give the losing party the opportunity to support his objection before the competent authority and it may lead to delay the issue of the award because the members of the arbitral tribunal need more time to consider the case and prepare the reasons.

In most civil law countries, such as Belgium¹¹⁶ and France. their laws governing the arbitration provide that the arbitrators must give their reasons upon which the award is based. For example, the French Code of Civil Procedure states in its Article 1471 that:

¹¹⁴ STEYN, Johnan., *International Handbook on Commercial Arbitration, England*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 21.

¹¹⁵ DOMKE, Martin., *Commercial Arbitration.* , New Jersey, USA, Prentice-Hall, INC. Englewood Clifs, 1965, p. 91.

¹¹⁶ The Belgian Judicial Code, Art. 1702 (6).

“ The decision shall be reasoned.”

Accordingly, if the arbitral award was made without giving its reasons it would be set aside. The Netherlands Arbitration Act of 1986 confirms such result where it provides that:

“ Setting aside of the award can take place only on one or more of the following grounds:

d- The award is not signed or does not contain reasons in accordance with the provision of article 1057.”¹¹⁷

By contrast, in many common law countries, such as the United States, the arbitration laws do not require that the arbitral tribunal gives the reasons for the award, unless the parties have requested that in the arbitration agreement or one of them has given the tribunal notice to set forth the reasons before the issue of the arbitral award. For example, neither the United States Federal Arbitration Act of 1925 nor States laws contain any requirements that the arbitral tribunal must give the reasons upon which the award is based. In practice, the arbitral awards only state the conclusion, unless the parties have agreed otherwise. In fact, the reasoned awards are rarely given in commercial cases.¹¹⁸ In the Case of *United Steelworkers of America v. Enterprise Wheel & Car Corp.* , the Supreme Court has ruled that arbitrators have no obligation to the court to give their reasons for an award.¹¹⁹

However, some common law countries, such as England,¹²⁰ Queensland and Pakistan require that the arbitral tribunal give the reasons upon which the arbitral award is based, unless the parties have agreed otherwise.¹²¹

¹¹⁷ The Netherlands Arbitration Act of 1986, Art. 1065 (1).

¹¹⁸ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), p. 327.

¹¹⁹ *United Steelworkers of America v. Enterprise Wheel & Car Corp.* case , Supreme Court Reporter (USA), vol. 4 L, Ed. 2d, 1960, pp. 1424-31.

¹²⁰ The new English Arbitration Act of 1996, Sec. 52 (4).

¹²¹ DAVID, René., *supra* note (13), p. 320.

Some international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules¹²² expressly require that the arbitrators should give the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given. The LCIA Arbitration Rules, for instance, state that:

“ The Tribunal shall make its award in writing and, unless all the parties agree otherwise, shall state the reasons upon which its award is based.”¹²³

The ICC Arbitration Rules are silent in respect of giving of the reasons for the arbitral award. However, the ICC International Court of Arbitration, in practice, remits the award to the arbitral tribunal for reconsideration and for giving the reasons for it, if the tribunal did not state the reasons for the award in its text.¹²⁴

Moreover, the AAA Arbitration Rules do not include any requirement to provide the reasons on which the arbitral award is based. However, Article 7 of the AAA Supplementary Procedure for International Commercial Arbitration submits to the fact that the parties often expect that the arbitral tribunal will state the reasons for the award when it issues such award.¹²⁵

In addition, some international conventions which govern the arbitration, such as the Washington Convention of 1965 require that reasons for the arbitral award should be given in the text of the award.¹²⁶ The European Convention of 1961, for instance, provides that :

“ The parties shall be presumed to have agreed that reasons shall be given for the award unless they

- a- either expressly declare that reasons shall not be given, or
- b- have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case

¹²² The UNCITRAL Arbitration Rules, Art. 32 (3).

¹²³ The LCIA Arbitration Rules, Art. 16 (1).

¹²⁴ REDFERN, Alan & HUNTER, Martin., *supra* note (4), p. 389.

¹²⁵ BLESSING, Marc., *International Arbitration Procedures- II.*, 1989, vol. 17, no. 10. International Business Lawyer, p. 467.

¹²⁶ The Washington Convention of 1965, Art. 48 (3).

neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.”¹²⁷

In international commercial arbitration, the arbitral tribunal should often set forth the reasons upon which the award is based. However, the question may arise in respect of the obligation to give reasons when the country, in which the arbitration takes place, does not require from the arbitral tribunal to state reasons for the award. Whereas the giving of the reasons is required in the country where the award will be recognised and enforced.

Indeed, in many countries, such as France, Italy and the Netherlands, the courts recognise and enforce the foreign arbitral awards, even though such awards do not contain the reasons upon which such awards are based. The French Court of Cassation rejected the appeal made against the arbitral award on the basis of the lack of the reasons because it was not contrary to *ordre public international* in France.¹²⁸

On the other hand, in the countries, which do not require reasoned arbitral awards, the arbitral tribunal should state the reasons for the award when the arbitration agreement requires that or when either of the parties requests that from the arbitral tribunal before the issue of the award. If one party requests from the arbitral tribunal to make the award without stating the reasons and the other party says nothing, no reasons should be given. But if the arbitral tribunal is doubtful whether the other party is aware of his rights, it should consider whether it will be right to ask him.¹²⁹

Moreover, the question may arise in respect of the ability of the parties to the dispute to dispense the arbitral tribunal from stating the reasons for the award, even though the arbitration laws require the mention of the reasons.

In some countries, such as Germany and Greece, the arbitration laws contain express provisions which allow the parties to request from the arbitral tribunal not to

¹²⁷ The European Convention of 1961, Art. VIII.

¹²⁸ DAVID, René., *supra* note (13), p. 322.

¹²⁹ HARMER, Donald L., *Structure and Content of Reasoned Award.*, August 1988, vol. 54, Arbitration, p. 164.

give the reasons for the award. However, in other countries, it is doubtful that the parties to the dispute may dispense the arbitrators from legal mandatory provisions which impose the giving of the reasons upon which the arbitral award is based.¹³⁰

In addition, the court has the right to remit the award to the arbitral tribunal and to order it to state the reasons for the arbitral award in details because such reasons will assist the court to consider any questions of law arising out of the arbitral award.

When the arbitrators are empowered as amiable compositeurs, should their award contain the reasons upon which it is based?.

Certain countries, such as Belgium, France and Italy require that the arbitrators, when act as amiable compositeurs, should give the reasons for their awards. However, in other countries, such as Greece and certain countries of Latin America, reasons for the arbitral award are not required in the case of the amiable composition.¹³¹

6.4.1 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 explicitly requires that the arbitral tribunal should give the reasons upon which the arbitral award is based. It states that:

“ The award shall notably include the arbitration instrument, a summary of the arguments of the parties and their documents, reasons for the award.”¹³²

The Implementation Rules of 1985 confirm such provision where they provide that:

“ Without prejudice to Articles 16 and 17 of the Arbitration Regulation,

¹³⁰ DAVID, René., *supra* note (13), p. 324.

¹³¹ *Ibid.*, p. 321.

¹³² The Arbitration Regulation of 1983, Art. 17.

arbitral awards must be made by a majority of votes. The award must be read by the Chairman of the arbitral tribunal at the hearing for this. It must contain the reasons and the decision.”¹³³

Moreover, the giving of the reasons is required when the arbitrators are empowered as amiable compositeurs. In practice, the arbitral tribunal usually states the reasons upon which the award is based. The reasons for the award are usually set forth in details and they take a large space in the original copy of the arbitral award.

The question of the validity of the arbitral award when it does not include the reasons may arise.

This question is theoretical because the arbitral tribunal, in practice, gives the reasons upon which the arbitral award is based. However, if the arbitral award was made without stating the reasons upon which it is based the competent authority, such as the Board of Grievances would have some alternatives to settle such question. This authority may remit the award to the arbitral tribunal and request it to give the reasons for the award, or it may submit the dispute to a new arbitral tribunal to decide it or it may set aside the award and decide the dispute by itself.

It seems that the competent authority will remit the award to the arbitral tribunal to give the reasons upon which the award is based because the competent authority has a large number of cases which it requires to decide, and the time and expenses of the arbitration will be saved by giving the arbitral tribunal the opportunity to state the reasons for the award rather than to decide the case by a new arbitral tribunal or by the competent authority itself.

¹³³ The Implementation Rules of 1985, Art. 41.

6.5 Signature of the award

Signature of the award by the arbitrators is an important requirement. The arbitrators usually sign the award before issuing it. However, if the arbitrators make the award without their signatures on it, the award may be a nullity because the arbitrators do not respect an essential condition required by most arbitration laws.

Countries have adopted different positions with respect to the necessity of signature of the arbitral award. Certain countries, such as China and Romania require that the arbitral award must be signed by all the arbitrators.¹³⁴ This requirement causes clear difficulties when one of the arbitrators is unable to sign the award or refuses to sign it. It will lead to lengthen the arbitral process and also to look for a compromise between all the arbitrators.

Many countries, such as Belgium, England¹³⁵ and France¹³⁶ state that the arbitral award should be signed by all the arbitrators. However, if an arbitrator is unable or unwilling to sign the award, this fact should be indicated in the text of the award and the award will be signed by the majority of the arbitrators. For example, the Belgian Judicial Code provides that:

“ An award shall be set down in writing and signed by the arbitrators. If one or more of the arbitrators are unable or unwilling to sign, the fact shall be recorded in the award. However, the award shall bear a number of signatures which is at least equal to a majority of the arbitrators.”¹³⁷

Certain countries, such as the former Czechoslovakia provide that it is sufficient that the arbitral award is signed by one arbitrator.¹³⁸

¹³⁴ SARCEVIC, Petar., *Essays on International Commercial Arbitration; in Making of Award and Termination of Proceedings, written by Phillipp Schweizer, KNOEPFLER*, London. Graham & Trotman, 1989. p. 165.

¹³⁵ The new English Arbitration Act of 1996, Sec. 52 (3).

¹³⁶ The French Code of Civil Procedure of 1980, Art. 1473.

¹³⁷ The Belgian Judicial Code, Art. 1701 (4).

¹³⁸ SARCEVIC, Petar., *supra* note (134), p. 165.

Some countries are silent in respect of the signature of the arbitral award. However, the arbitral award is normally in writing and signed by all the arbitrators, or by the majority of them when an arbitrator refuses to sign. As well, it is not unusual but not obligatory, for the signatures of the arbitrators to be attested by a witness.¹³⁹

On the other hand, many international and institutional rules of arbitration, such as the AAA Arbitration Rules¹⁴⁰ and the UNCITRAL Arbitration Rules¹⁴¹ expressly require that the award should be signed by all the arbitrators, or the majority, if an arbitrator is unable or unwilling to sign the award. For example, the LCIA Arbitration Rules state that:

“ If an arbitrator refuses or fails to sign the award, the signature of the majority shall be sufficient, provided that the reason for the omitted signature is stated.”¹⁴²

The ICC Arbitration Rules require that the arbitrators should refer the award in draft form to the ICC International Court of Arbitration for its scrutiny before signing the award. They provide that:

“ Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the International Court of Arbitration.”¹⁴³

The ICC’s Court exercises a supervisory, rather than arbitral or judicial, function in respect of such matter. The arbitrators may or may not accept any modifications in the draft form of the award by such Court.¹⁴⁴

¹³⁹ MUSTILL, Michael J. & BOYD, Stewart C., *The Law and Practice of Commercial Arbitration in England*, 1st Ed., London, Butterworth & Co. Ltd, 1982, p. 337; also WALTON, Anthony & VITROIA, Mary., *Russell on the Law of Arbitration*, 20th Ed., London, Stevens & Sons Ltd, 1982, p. 300.

¹⁴⁰ The AAA Arbitration Rules, Art. 28 (3).

¹⁴¹ The UNCITRAL Arbitration Rules, Art. 32 (4).

¹⁴² The LCIA Arbitration Rules, Art. 16 (3).

¹⁴³ The ICC Arbitration Rules, Art. 21.

¹⁴⁴ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), p. 342.

6.5.1 Reasons for a signature being missed

There are some reasons which may prevent an arbitrator from signing the award, such as after the arbitral award is finalised an arbitrator dies, becomes physically unable to sign or paralysed, or an arbitrator may not wish to disappoint the party who nominates him and who is the loser in the award, or the majority of the arbitrators may conduct the arbitral process in directions which make that arbitrator feels he has not been sufficiently heard or that arbitrator may dissent from the award and then refuse to sign.¹⁴⁵ In these cases, it is important that the arbitral award is signed by the majority of the arbitrators and contains the fact of the missing signature and specifies the reasons therefor. The lack of majority signatures may make the arbitral award under a penalty of nullity.¹⁴⁶

On the other hand, certain legal writers suggest that an arbitrator may authorise another person, for instance, the chairman of the arbitral tribunal, to sign the award on his behalf, when such arbitrator is unable to sign the award because, for instance, he is paralysed.¹⁴⁷ However, it seems that such authorisation is not necessary because the signatures of the majority of the arbitrators are sufficient and they set forth the reasons for missing signature of this arbitrator in the award itself.

Moreover, it is not necessary that the arbitral award is signed at the same time and place, especially in international commercial arbitration where the arbitrators are usually from different countries and live in distant places. In this case, the award may be passed between the arbitrators for their signatures when they have agreed on its contents.

¹⁴⁵ RUBINO-SAMMARTANO, Mauro., supra note (19), p. 423; also BROCHES, Aron., *Commentary on the UNCITRAL Model Law on International Commercial Arbitration.*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1990, p. 162.

¹⁴⁶ MATRAY, Lambert., supra note (40), p. 15.

¹⁴⁷ SARCEVIC, Petar., supra not (134), p. 165; also DAVIDSON, Fraser., supra note (6). p. 162.

6.5.2 Dissenting opinions

When an arbitrator dissents from the award made by the majority of the arbitrators, he will refuse to sign such award. Sometimes, such arbitrator may agree to sign the award if the other arbitrators give him the opportunity to state his dissenting opinions in the award. In this case, the question which may arise is whether it is possible to allow the dissenting arbitrator to state his opinions on the award and he then signs it.

Countries have reached various positions in respect to the possibility to allow the dissenting opinions to state in the arbitral award. Some countries, such as France do not allow dissenting opinions to be included in the arbitral award because this is contrary to the principle of secrecy of the deliberations. The French Code of Civil Procedure provides that:

“Arbitrators’ deliberations are secret.”¹⁴⁸

Certain other countries, such as Switzerland and the Netherlands do not deal expressly with such matter. For example, the Swiss law does not mention the dissenting opinions even though one legal writer states that an arbitrator has the right to give reasons for his dissent.¹⁴⁹

Other countries, such as many common law countries and most countries of Latin America, allow an arbitrator to inform his dissenting opinions to the parties to the dispute. Such opinions will not effect the validity of the arbitral award.¹⁵⁰

On the other hand, only the ICSID Arbitration Rules explicitly give an arbitrator the right to state his reasons for any dissent. Such Rules provide that:

“ Any member of the Tribunal may attach his individual opinion to the award,

¹⁴⁸ The French Code of Civil Procedure of 1980, Art. 1469.

¹⁴⁹ BLESSING, Marc. *The New International Arbitration Law in Switzerland*, 1988, vol. 5, Journal of International Arbitration, p. 9.

¹⁵⁰ DAVID, René., *supra* note (13), p. 326.

whether he dissents from the majority or not, or a statement of his dissent.”¹⁵¹

Other institutional rules of arbitration, such as the LCIA Arbitration Rules and the ICC Arbitration Rules do not contain any provision which deals with the dissenting opinions. In practice, it seems that such Rules do not prohibit dissenting opinions even though they discourage the making of the dissenting opinions as a part of the arbitral award. Indeed, the ICC International Court of Arbitration, for instance, has no power to prevent a dissenting arbitrator from communicating his opinions to the parties.¹⁵²

Moreover, in international commercial arbitration, an arbitrator often expresses his dissent by refusing to sign the arbitral award. Dissenting opinions are not issued in the award, but they may be set forth in a separate sheet and attached to the award, if the other arbitrators agree, or these opinions may be communicated to the parties separately. In fact, it is very important to make sure that the law of the place of arbitration and the law of the country where it is known the recognition and enforcement of the award is likely to be sought, allow an arbitrator to give his dissenting opinions before the issue of these opinions. For example, in *Saudi Arabia v. Arabian American Oil Company (Aramco) Case*, one of the arbitrators wrote his dissenting opinion and delivered it.¹⁵³

6.5.2.1 Advantages and disadvantages of dissenting opinions

There are some advantages of the giving of the dissenting opinions, such as when the arbitral award is objected before the competent authority, such as the court. This authority will have all the different points of view which will facilitate its task.

¹⁵¹ The ICSID Arbitration Rules, Art. 47 (3).

¹⁵² CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), p. 400.

¹⁵³ *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 International Law Reports (I.L.R). 1963, pp. 228-29.

As well, it can be concluded from giving of dissenting opinions that all the arbitrators have been granted the same opportunity to set forth their opinions.

However, there are some disadvantages resulting from giving the dissenting opinions, such as each party-appointed arbitrator may be under pressure to write his opinion in order to support the claims of the party who appointed him. Moreover, the mention of dissenting opinions may be contrary to the provisions of the applicable law of the arbitration which do not allow to state dissenting opinions.¹⁵⁴ As well, in many countries, such as France,¹⁵⁵ the secrecy of the deliberations prevents an arbitrator from giving his dissenting opinions. In addition, the giving of dissenting opinions may encourage the losing party to challenge the arbitral award on the basis of these opinions and then the recognition and enforcement of the arbitral award will be delayed. This is contrary to the aims of the arbitration as a means of resolving the disputes.

6.5.2.2 Methods of making of dissenting opinions

There are three methods by which dissenting opinions may be issued. Dissenting opinions may be mentioned in the original copy of the arbitral award, or they may be written in a separate document and annexed to the award or they may be delivered to the parties by the dissenting arbitrator himself after the arbitral award has officially been notified to the parties.

6.5.3 The position in the Kingdom of Saudi Arabia

The Arbitration Regulation of 1983 expressly requires that the arbitrators should sign the award. It states that:

¹⁵⁴ BAKER, Stewart A. & DAVIS, Mark D., *supra* note (2), p. 166.

¹⁵⁵ The French Code of Civil Procedure of 1980, Art. 1469.

“ The award shall notably include the arbitration instrument, and the signature of the arbitrators.”¹⁵⁶

Moreover, its Implementation Rules of 1985 affirm such provision and they require that the clerk of the arbitration should also sign the arbitral award. They provide that:

“ The arbitrators and secretary shall sign the original copy of the award.”¹⁵⁷

When the arbitration conducted under the supervision of one of the Saudi Chambers of Commerce and Industry and the parties to the dispute have agreed upon the Chambers of Commerce and Industry Regulation of 1980 and its Implementation Rules of 1981 as the applicable law of the arbitration proceedings the arbitral award may be signed by only the Chairman of the arbitral tribunal and one of the arbitrators when the tribunal consists of three arbitrators. The Implementation Rules of the Chambers of Commerce and Industry Regulation state that:

“ The Chairman and the member of the arbitral tribunal shall sign the issued award and shall notify the parties of the dispute with a copy thereof.”¹⁵⁸

The Arbitration Regulation of 1983 has treated the problem arising out of the refusal of an arbitrator to sign the award where it requires to set forth that in the award. It provides that:

“ If one or more of them, arbitrators, refuse to sign the award, such refusal shall be stated in the award document.”¹⁵⁹

¹⁵⁶ The Arbitration Regulation of 1983, Art. 17.

¹⁵⁷ The Implementation Rules of 1985, Art. 41.

¹⁵⁸ The Implementation Rules of the Chambers of Commerce and Industry of 1981, Art. 53.

¹⁵⁹ The Arbitration Regulation of 1983, Art. 17.

It can be concluded from the above article that the signature of the majority of arbitrators is sufficient. One legal writer thinks that no dissenting opinions may be made in the arbitral award.¹⁶⁰

In practice, the arbitral awards are usually signed by all the arbitrators, whether the award was made by unanimously or by a majority vote. When the award is made by the majority, the refusing arbitrator normally signs the arbitral award and writes his dissenting opinions in a separate document which is annexed to the original copy of the award.

There are certain cases in which the dissenting arbitrator writes his opinions in a separate document and annexes it to the award. For example, the case of N. Co. for Adm. Ltd Serv. (Services company) v. S. Co. Ltd (Maintenance company)¹⁶¹ and also the case of S. T. Co. (Construction company) v. Mr. A. A. A. (Saudi natural person)¹⁶² where the arbitral awards were rendered by the majority votes and one arbitrator in each case wrote his dissenting opinions in separate documents and attached them to the original copies of the awards.

¹⁶⁰ EL-AHDAB, Abdul Hamid. *supra* note (51), p. 45.

¹⁶¹ The Arbitral Award No. 1107/1/k 1408, dated 22/08/1410 A.H. (1990 A.D.).

¹⁶² The Arbitral Award No. 10/1409, dated 07/03/1411 A.H. (1991 A.D.).

6.6 Registration and notification of the award

6.6.1 Registration of the award

The arbitral award may or must be deposited with the registry of the competent authority, such as the courts in ad hoc arbitration or with the secretariat of the arbitral institution in institutional arbitration. The clerk of such registry usually notifies the award to the parties to the dispute after its registration. However, failure to deposit the arbitral award may not abrogate the award because the provisions of the laws, which require the deposit of the arbitral award, are often optional.¹⁶³

The registration of the arbitral award with the competent authority, such as the courts is useful for the parties to the dispute because the parties, in this case, comply with the demand of country which requires the registration of the arbitral award. Further, the registration of the arbitral award will assist to determine the outset of the period of the time limit within which any party may appeal the award and the procedure of enforcement of the award will be easier, when it is registered with the court of the country where such enforcement is sought.

In certain countries, such as Germany¹⁶⁴ and the Netherlands, the arbitral award must be registered with the competent court of the place where it is made. For example, the Netherlands Arbitration Act of 1986 provides that:

“ The arbitral tribunal shall ensure without delay:

b- the original of the final or partial final award is deposited with the Registry of the District Court within whose district the place of arbitration is located.”¹⁶⁵

¹⁶³ MATRAY, Lambert., *supra* note (40), p. 19.

¹⁶⁴ RUBINO-SAMMARTANO, Mauro., *supra* note (19), p. 457.

¹⁶⁵ The Netherlands Arbitration Act of 1986, Art. 1058 (1).

In other some countries, such as Switzerland, the registration of the arbitral award by the court is optional. The Swiss Private International Law Act of 1987, for instance, states that:

“ Each party may at its own expense deposit a copy of the award with the Swiss court of the seat of the arbitral tribunal.”¹⁶⁶

In other countries, such as England, France and the United States, the registration of the arbitral awards is not required in their arbitration laws. However, the registration of the awards is important to render them enforceable in such other countries.¹⁶⁷ For example, the French Code of Civil Procedure provides that:

“ The arbitral award may be forcibly executed only by virtue of an order of *exequatur* by the *Tribunal de Grande Instance* having jurisdiction at the place where the award was rendered. *Exequatur* shall be ordered by the enforcement judge of the Tribunal. To this effect, the text of the award and a copy of the arbitration agreement shall be filed by one of the arbitrators or by the most diligent of the parties, at the Secretariat of the court.”¹⁶⁸

Moreover, most international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules and the LCIA Arbitration Rules are silent in respect of the necessity of the registration of the arbitral awards made under their rules. However, The ICC Arbitration Rules expressly require that the arbitral awards should be deposited with the Secretariat of the ICC International Court of Arbitration. Such Rules state that:

“ An original of each award made in accordance with the present Rules shall be deposited with the Secretariat of the International Court of Arbitration.”¹⁶⁹

¹⁶⁶ The Swiss Private International Law Act of 1987, Art. 193 (1).

¹⁶⁷ RUBINO-SAMMARTANO, Mauro., *supra* note (19), pp. 456-57; also HOLTZMANN, Howard M., *supra* note (60), p. 26.

¹⁶⁸ The French Code of Civil Procedure of 1980, Art. 1477.

¹⁶⁹ The ICC Arbitration Rules, Art. 25.

Most countries, such as Egypt and the Netherlands do not specify a time limit within which the arbitral award should be registered, but it should be done without delay. However, certain countries determine a period within which the arbitral award should be registered. For example, in Italy the arbitral award should be registered within one year of the date it is made.¹⁷⁰

The question may arise in respect to the effects if the statutory time limits to register the arbitral award expired without making such registration before the competent authority.

Sometimes, the country, where the arbitral award will be enforced, may require from the winning party to pay a specific percentage from the total amount which he will receive from the losing party according to the arbitral award as a tax to the authorities of such country. In this case, the winning party may attempt to avoid to pay such percentage, particularly when the amount of the arbitral award is large. To this end, he tries to negotiate with the losing party to enforce the award without submitting it to the competent authority of this country. The winner may agree to cancel a part of the total amount of the arbitral award less than the statutory percentage required in the country where the enforcement of the award is sought. The loser will accept this offer because he will pay an amount less than the amount which he should pay according to the arbitral award.

However, if the arbitral award was submitted to the competent authority, such as the courts for the registration after the expiry of the period specified to do that the competent authority has two choices. It may accept to register the arbitral award or it may refuse that and then it will refuse to issue an order to enforce this award. In fact, the decision of the competent authority will often depend on the circumstances and reasons which prevented the winning party or the arbitral tribunal from submitting the arbitral award to the competent authority for registration.

Indeed, it seems that the competent authority may register the arbitral award and then issue an order to enforce it even if such award is referred to it after the expiry of the time limit of the registration because the stipulation of the registration

¹⁷⁰ RUBINO-SAMMARTANO, Mauro., *supra* note (19), p. 456.

of the arbitral award is a formal requirement and it is not considered as a fundamental principle in the arbitral process, such as the principle of giving of the parties to the dispute the sufficient opportunity to present their claims, defence and evidence during the arbitration proceedings.

6.6.2 Notification of the award

The arbitral award must be notified to each party without delay after it has been made. Many countries, such as the Netherlands explicitly require that the arbitral award should be notified without delay. The Netherlands Arbitration Act of 1986 states that:

“ The arbitral tribunal shall ensure that without delay:
a- a copy of any award, signed by an arbitrator or the secretary of the arbitral tribunal, is communicated to the parties.”¹⁷¹

In other countries, such as France, it is necessary to notify the arbitral award to the parties to the dispute, although the arbitration laws of such countries do not contain any provision in respect to the communication of the arbitral award to the parties to the dispute. In England, the arbitral tribunal usually notifies the parties to the dispute that the award has been made and it is ready for collection after payment of the fees and costs of the arbitration.¹⁷²

In addition, international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules¹⁷³ and the LCIA Arbitration Rules¹⁷⁴ generally contain provisions for the notification of the arbitral award to the parties. For example, the ICC Arbitration Rules provide that:

¹⁷¹ The Netherlands Arbitration Act of 1986, Art. 1058 (1).

¹⁷² DAVID, René., *supra* note (13), p. 318.

¹⁷³ The UNCITRAL Arbitration Rules, Art. 32 (6).

¹⁷⁴ The LCIA Arbitration Rules, Art. 16 (4).

“ Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitrator ; provided always that the costs of arbitration have been fully paid to the International Chamber of Commerce by the parties or one of them.”¹⁷⁵

The time limit, within which a party may object the arbitral award, often starts from the date of notification of the award to him, and not from the date on which the award has been made.

There are several methods by which the arbitral award may be communicated to the parties. It may be notified to the parties by the arbitral tribunal itself according to the Dutch law and the UNCITRAL Arbitration Rules,¹⁷⁶ or by the chairman of the arbitral tribunal according to the practice in Belgium,¹⁷⁷ or by the competent authority, such as the court after its registration according to the Portuguese law,¹⁷⁸ or by the secretariat of the arbitral institution when the arbitration is administered under the auspices of one of the arbitral institutions,¹⁷⁹ or by the arbitrators who will inform the parties to the dispute that the award has been made and ask them to collect it after payment of the costs of the arbitration as is the position in England.¹⁸⁰

On the other hand, the arbitral award may be notified by the ordinary mail to the addresses of the parties to the dispute. For example, the AAA Arbitration Rules expressly provide that:

“ Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.”¹⁸¹

¹⁷⁵ The ICC Arbitration Rules, Art. 23 (1).

¹⁷⁶ The Netherlands Arbitration Act of 1986, Art. 1058 (1) (a); also the UNCITRAL Arbitration Rules, Art. 32 (6).

¹⁷⁷ MATRAY, Lambert., *supra* note (40), p. 19.

¹⁷⁸ RUBINO-SAMMARTANO, Mauro., *supra* note (19), p. 457.

¹⁷⁹ The ICC Arbitration Rules, Art. 25 (1).

¹⁸⁰ MUSTILL, Michael J. & BOYD, Stewart C., *supra* note (139), p. 338.

¹⁸¹ The AAA Arbitration Rules, Art. 45.

However, in some countries, such as France, the notification of the arbitral award is usually made by registered or certified letter with a return receipt.¹⁸²

Most countries do not determine a specific time limit within which the arbitral award must be notified to the parties to the dispute. However, it is important that the award is notified promptly to the parties. In countries which require that the arbitral award must be registered with the competent authority, such as the courts the award will be communicated to the parties as soon as possible after its registration.

6.6.3 The position in the Kingdom of Saudi Arabia

6.6.3.1 Registration of the award

The Arbitration Regulation of 1983 expressly requires that all awards made by the arbitral tribunal should be deposited within five days of their making with the authority originally having jurisdiction over the dispute, such as the Board of Grievances.¹⁸³

Moreover, in arbitrations conducted according to the Labour and Workmen Regulation of 1969, it is an essential requirement that the arbitral awards should be registered with the Committee for the Settlement of Labour Disputes in whose district such awards are made within one week after their issue.¹⁸⁴

The question may arise in respect of the validity of the arbitral award if it is submitted to the competent authority after the five days time limit.

¹⁸² DERAINS, Yves., *International Handbook on Commercial Arbitration, France*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p.23.

¹⁸³ The Arbitration Regulation of 1983, Art. 18.

¹⁸⁴ VAN DEN BERG, Albert Jan., *International Handbook on Commercial Arbitration, Saudi Arabia*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, p. 25.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent with respect to this question. In practice, the arbitral tribunal not the parties to the dispute assumes the task to refer the award to the competent authority for registration. Therefore, the delay in referring the arbitral award to the competent authority for registration usually does not happen because all the arbitrators take into account the specific time limit and they immediately submit their award to the competent authority for its approval.

However, if the arbitral tribunal submitted the award to the competent authority after the five days time limit the competent authority would consider the reasons which led to such delay and it would decide whether or not such reasons are justifiable. Accordingly, the competent authority might refuse to accept such reasons, abrogate the arbitral award and decide the dispute again by itself or by a new arbitral tribunal, or it might accept such reasons and issue an order to enforce the arbitral award.

In fact, it seems that the competent authority will take into consideration the consumed time and the expenses of the arbitration before issuing its decision. It does not often abrogate the arbitral award solely on the basis of this reason because the time limit of the registration of the award is a formal requirement and its infringement usually does not have serious consequences.

In fact, it seems that the Saudi legislator aims to speed up enforcement proceedings when he has determined a short time limit for filing the arbitral award with the competent authority.

On the other hand, the Arbitration Regulation of 1983 does not determine a specific time limit within which the competent authority should file the arbitral award. However, in practice, the competent authority usually files the awards within thirty days from their submission to it by the arbitrators. For example, in the case of R. Co. for Comm. (Commercial company) v. J. Ins. Co. Ltd (Jordanian insurance company) where the competent authority filed the arbitral award within three weeks from its submission.¹⁸⁵ Also, in the case of S. T. Co. (Construction company) v. Mr.

¹⁸⁵ The Arbitral Award No. 1/1406, dated 12/04/1406 A.H. (1986 A.D).

A. A. A. (Saudi natural person) where the award was filed after thirty four days from its submission to the competent authority.¹⁸⁶ Indeed, it seems that such period is reasonable, but it is highly desirable that the Saudi legislator determines a specific time limit within which the competent authority should file the arbitral award.

6.6.3.2 Notification of the award

When the arbitrators reach a specific decision they will draw up the award and sign it. After that, the arbitrators will hold a specific session in which the arbitral award will be read in the presence of the parties to the dispute and their representatives.¹⁸⁷

The arbitrators will then submit the original copy of the arbitral award to the competent authority for registration and they will also ask the parties to the dispute or their representatives to collect copies of the arbitral award from the secretary of the arbitration.¹⁸⁸ However, if one or both of the parties, or their representatives did not collect copies of the arbitral award the secretary of the arbitration will notify them the award by registered letter or by fax.

In practice, the clerk of the competent authority carries out the notification of the arbitral award to the parties to the dispute after the competent authority has filed such award.

On the other hand, if the competent authority refuses to register the arbitral award it should set forth the reasons for such refusal, such as the arbitrators did not sign and state the reasons for the award. In this case, the competent authority may remit the arbitral award to the arbitrators who will amend it, or the competent authority may submit the dispute to a new arbitral tribunal or it may decide the dispute by itself.

¹⁸⁶ The Arbitral Award No. 10/1409, dated 07/03/1411 A.H. (1991 A.D.).

¹⁸⁷ The Implementation Rules of 1985, Art. 41.

¹⁸⁸ The Arbitration Regulation of 1983, Art. 18.

The parties to the dispute may object the arbitral award within fifteen days from the date on which they were notified of the arbitral award by the clerk of the competent authority.¹⁸⁹

On the other hand, the Implementation Rules of the Chambers of Commerce and Industry Regulation contain a provision which provides that the arbitral award should be notified to the parties to the dispute.¹⁹⁰ However, such Rules do not determine a specific time limit within which the notification of the arbitral award should be carried out to the parties.

¹⁸⁹ Ibid., Art. 18.

¹⁹⁰ The Implementation Rules of the Chambers of Commerce and Industry Regulation. Art. 53.

6.7 Correction and interpretation of the award

6.7.1 Correction of the award

The jurisdiction of the arbitral tribunal generally terminates when the tribunal makes its final award which decides all the issues of the dispute. However, the arbitral tribunal may correct any minor clerical or typographical errors in the award when the arbitration agreement or the applicable law of the arbitration gives such power to it. The arbitral tribunal may correct an error either at the request of one or both of the parties, or on its own motion.

In most countries, such as England, France¹⁹¹ and the Netherlands,¹⁹² the arbitral tribunal has the power to correct any clerical mistakes or errors in calculation contained in its award usually only within a short time limit. The new English Arbitration Act of 1996 expressly states that:

“ The tribunal may on its initiative or on the application of a party-
(a)- correct an award so as to remove any clerical mistake or error
arising from an accidental slip or omission.”¹⁹³

In the United States, the Federal Arbitration Act of 1925 and some states arbitration laws give the power to correct errors existing in the arbitral award to the relevant district court in whose district the award was made. The Federal Arbitration Act of 1925, for instance, provides that:

“ the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration.”¹⁹⁴

¹⁹¹ The French Code of Civil Procedure of 1980, Art. 1475.

¹⁹² The Netherlands Arbitration Act of 1986, Art. 1060 (4).

¹⁹³ The new English Arbitration Act of 1996, Sec. 57 (3) a.

¹⁹⁴ The Federal Arbitration Act of 1925, Sec. 11.

However, many states, such as Florida, Illinois and Michigan permit that the corrections and modifications of the arbitral award may be made on the initiative of the arbitrators themselves.¹⁹⁵

On the other hand, many international and institutional rules of arbitration, such as the UNCITRAL Arbitration Rules¹⁹⁶ and the LCIA Arbitration Rules, contain provisions which give the arbitral tribunal the power to correct any clerical or typographical errors in the award, either at the request of one or both of the parties to the dispute, or by the arbitral tribunal on its motion. For example, the LCIA Arbitration Rules expressly state that:

- “ 1- Within thirty days of receipt of the award, unless another period of time has been agreed upon the parties, a party may by notice to the Registrar request the Tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature.
2- The Tribunal may correct any error of the type referred to in Article 17.1 on its own initiative within thirty days of the date of the award.”¹⁹⁷

Some other institutional rules, such as the ICC Arbitration Rules, are silent in respect of the power of the arbitral tribunal to correct any clerical or typographical errors in the award. The silence of the ICC Arbitration Rules may be justified because such Rules give the ICC International Court of Arbitration the power to scrutinise all awards in draft form before they are signed and issued to the parties, and any errors should be picked up at this stage.¹⁹⁸

On the other hand, if the arbitral tribunal refused the request for the correction of a clerical or typographical error existing in the arbitral award without any justified reasons the party, who submitted this request, might challenge the decision of the arbitral tribunal concerning the refusal of the correction of such error before the authority having competence to hear the dispute.

¹⁹⁵ DOMKE, Martin., supra note (115), p. 92.

¹⁹⁶ The UNCITRAL Arbitration Rules, Art. 36 (1).

¹⁹⁷ The LCIA Arbitration Rules, Art. 17.

¹⁹⁸ REDFERN, Alan & HUNTER, Martin., supra note (4), p. 374.

The request for correction of any errors or mistakes in the arbitral award should be presented within a short time of the award being issued. The duration of such period varies in the different arbitration laws. In some countries, such as Egypt¹⁹⁹ and the Netherlands, either party may submit his request for correction of any computation or typographical errors in the arbitral award to the arbitral tribunal within thirty days after the date of the deposit of the award. The Netherlands Arbitration Act of 1986 states that:

“ If the details referred to in article 1057 (4) (a) to (d) inclusive are stated incorrectly or are partially or wholly absent from the award, a party may, up to thirty days after the date of the deposit of the award with the Registry of the District Court, request in writing that the arbitral tribunal correct the mistake or omission.”²⁰⁰

The arbitral tribunal may extend the time limit period determined to correct clerical and typographical errors in the award, if the tribunal considers this to be necessary. For example, the new Egyptian Arbitration Act of 1994 explicitly gives the arbitral tribunal another thirty days to correct the award if there are justified reasons.²⁰¹ As well, the UNCITRAL Model Law of 1985 gives the arbitral tribunal the power to extend the duration of the period within which it corrects any clerical and typographical errors in the award if it considers that to be necessary.²⁰²

However, the request for the correction of the arbitral award may be submitted by one or both of the parties to the dispute after the expiry of the time limit within which such request should be referred. In this case, the authority which has the power to correct the arbitral award, whether the arbitral tribunal or the courts, will consider the circumstances and reasons which cause such delay. Then, it may accept the request for the correction and decide it, if it considers there are justified reasons for the delay, or it may refuse the request for the correction.

¹⁹⁹ The new Egyptian Arbitration Act of 1994, Art. 50 (1).

²⁰⁰ The Netherlands Arbitration Act of 1986, Art. 1060 (2).

²⁰¹ The new Egyptian Arbitration Act of 1994, Art. 50 (1).

²⁰² The UNCITRAL Model Law of 1985, Art. 33 (4).

In fact, the competent authority, whether the arbitral tribunal or the courts, may accept the request for the correction of the arbitral award, even if the time limit of the correction of the award has expired, especially when the error existing in the arbitral award is very clear and it may lead to dangerous consequences if it is not corrected. For example, when the amount mentioned in the arbitral award is large and an error in the calculation has reduced it to a small amount.

When the arbitral tribunal makes the corrections it will record and sign it on the original copies of the award or it may set out such corrections in a separately signed document which will be considered as a part of the original award. Indeed, any correction should be complied with the formalities required by the applicable law of the arbitration, such as the writing of the award, the giving of reasons, the signature of the arbitrators and so on.

6.7.2 Interpretation of the award

The arbitral tribunal sometimes does not have the power to interpret the final award when it contains an ambiguity of language, save where the competent authority, such as the court specifically remits the award to the arbitral tribunal for interpretation or clarification. However, the arbitral tribunal may be given the power to interpret the award at the request of the parties to the dispute without an order of the competent authority.²⁰³ It may also interpret the award if the applicable law of the arbitral process gives it such power.

The national arbitration laws of different countries vary in respect of the interpretation of the arbitral awards. Some countries, such as Egypt,²⁰⁴ England²⁰⁵ and France expressly give the arbitral tribunal the power to interpret the award , when

²⁰³ REDFERN, Alan & HUNTER, Martin., supra note (4), p. 374.

²⁰⁴ The new Egyptian Arbitration Act of 1994, Art. 49.

²⁰⁵ The new English Arbitration Act of 1996, Sec. 57 (3) a.

one of the parties to the dispute requests that. For example, the French Code of Civil Procedure provides that:

“ The award terminates the jurisdiction of the arbitrator with respect to the dispute which it decides.
Nevertheless, an arbitrator has the power to interpret the award, to rectify errors and material omissions which may affect it, and to complete it whenever he has omitted to rule on an element of the claim.”²⁰⁶

In some other countries, such as Belgium, interpretation of the arbitral award is unknown under their laws governing the arbitration. However, in practice, the power of the interpretation of the award is given to the courts not to the arbitral tribunal which has only the power to correct any errors in the award. For example, in Belgium, the request for the interpretation of the arbitral award must be brought before the Court of First Instance.²⁰⁷

On the other hand, international and institutional rules of arbitration provide different rules in respect of the interpretation of the arbitral award. Some of them, such as the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules²⁰⁸ explicitly confer the arbitral tribunal the power to interpret any ambiguity in the award at the request of a party, not of its own initiative. For example, the UNCITRAL Arbitration Rules state that:

“ Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.”²⁰⁹

Certain other institutional rules of arbitration, such as the ICC Arbitration Rules and the AAA Arbitration Rules do not contain any provisions which deal with the question of the interpretation of the arbitral award.

²⁰⁶ The French Code of Civil Procedure of 1980, Art. 1475.

²⁰⁷ MATRAY, Lambert., *supra* note (40), p. 18.

²⁰⁸ The ICSID Arbitration Rules, Rule. 51.

²⁰⁹ The UNCITRAL Arbitration Rules, Art. 35 (1).

The LCIA Arbitration Rules expressly allow either party to request from the arbitral tribunal to correct any clerical and typographical errors in the award and also to make an additional award as to the issues of the dispute which were not treated by the tribunal in the original final award.²¹⁰ However, such Rules do not give the power of the interpretation of the award to the arbitral tribunal. In fact, it seems that the arbitral tribunal does not have the power to clarify an ambiguity in the award according to the LCIA Arbitration Rules.

The time limit, within which any ambiguity in the award should be clarified, is normally short. Some countries, such as Egypt require that the request for interpretation of the ambiguous award should be submitted by either party within thirty days of receipt of the award.²¹¹

As well, the UNCITRAL Arbitration Rules contain a similar provision in respect of the time limit within which the interpretation of the award should be given by the arbitral tribunal.²¹²

The question may arise with respect to the consequences if one or both of the parties to the dispute submitted the request for interpretation of the arbitral award after the expiry of the time limit within which it should be referred to the arbitral tribunal or to the court.

According to some national arbitration laws, such as Article 49 (2) of the new Egyptian Arbitration Act of 1994, it is possible for the arbitral tribunal to extend the time limit to interpret the arbitral award another thirty days, if it considers this to be necessary. However, if such extended period expired without interpretation of the award the court originally having jurisdiction over the dispute might make the interpretation.

Also, the UNCITRAL Model Law of 1985 allows the arbitral tribunal to extend, if necessary, the period of time within which it may interpret the ambiguity of the arbitral award presented by either party to the dispute.²¹³

²¹⁰ The LCIA Arbitration Rules, Art. 17.

²¹¹ The new Egyptian Arbitration Act of 1994, Art. 49 (2).

²¹² The UNCITRAL Arbitration Rules, Art. 35 (1).

²¹³ The UNCITRAL Model Law of 1985, Art. 33 (4).

Other national arbitration laws, such as the French law are silent in respect of such question. In fact, it is possible that the arbitral tribunal considers the reasons which led to refer the request for interpretation of the arbitral award after the expiry of the time limit and it may accept or refuse the request.

Moreover, it is possible that the authority competent to hear the dispute, such as the court decides the request for interpretation of the ambiguous award on the basis that the arbitral tribunal loses its power to interpret the award after the expiry of the time limit within which the request for interpretation should be submitted to the arbitral tribunal.

Some countries, such as France, distinguish between domestic and international arbitrations held inside them in respect of the interpretation of the arbitral award by the arbitral tribunal which made such award. The French law allows interpretation domestically, but not in international arbitrations held in France.²¹⁴ Whereas the Swiss Federal Courts have recently recognised that an interpretation of the arbitral award could take place where an international commercial arbitration is held in Switzerland.²¹⁵

In fact, the need to interpret the arbitral awards may occur particularly in international commercial arbitrations because the parties to the dispute and the arbitrators are usually from different legal systems and speak different languages.

The interpretation of the arbitral award is not considered a second award which abrogates the original one, but such interpretation is considered as a part of the original award. The arbitrators sign such interpretation and insert it in the original award or they may write it in a separately signed document.

When there are justified reasons which make the arbitral tribunal unable to reconvene, such as death of one or more of the arbitrators, the power to interpret the ambiguous award will be vested in the authority originally having jurisdiction over the dispute.²¹⁶

²¹⁴ KNUTSON, Robert D. A., *The Interpretation of Arbitral Awards, When is a Final Award not Final?*, 1994, vol. 11, no. 2, Journal of International Arbitration, p. 100.

²¹⁵ Ibid., p. 100.

²¹⁶ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (9), p. 369.

6.7.3 The position in the Kingdom of Saudi Arabia

6.7.3.1 *Correction of the award*

Although the Arbitration Regulation of 1983 is silent with respect to the correction of the arbitral award, its Implementation Rules of 1985 contain a provision which gives the arbitral tribunal the power to correct any clerical, or typographical or mathematical errors in the award.²¹⁷ The arbitral tribunal may correct the award at the request of either party or on its own motion. The correction of the arbitral award should be made on the original copy of the award and signed by the members of the arbitral tribunal.

The decision of the arbitral tribunal concerning the request for correction of the arbitral award may be objected to all available grounds of objection, such as where the arbitral tribunal has exceeded its power regarding the correction of such award or if a part of the decision on the correction of the arbitral award has amended or infringed the original award. In this case, the party may object to the corrected award before the competent authority, such as the Board of Grievances whose decision is considered final and binding.

On the other hand, if the arbitral tribunal makes a decision which refuses the request for correction of the arbitral award the parties to the dispute may object to the original before the competent authority on the basis of the decision of the refusal of the correction, but the parties to the dispute could not object to the decision of the refusal of the correction alone.²¹⁸

The Implementation Rules of 1985 do not determine a specific time limit within which the parties to the dispute should submit their request for correction of the arbitral award to the arbitral tribunal. Accordingly, the parties may refer such request at any time.

²¹⁷ The Implementation Rules of 1985, Art. 42.

²¹⁸ Ibid., Art. 42.

However, it seems that the request for correction of the award should be referred before the expiry of the time limit of the arbitration and also before the deposit of the award with the competent authority because the arbitral tribunal usually loses its jurisdiction from the date of the deposit of the award by the competent authority. Accordingly, if either party to the dispute has submitted a request for the correction of the arbitral award to the arbitral tribunal after the expiry of the time limit of the arbitration the arbitral tribunal will refuse such request and ask such party to refer its request to the competent authority which will decide it.

Certain legal writers think that the parties to the dispute can submit the request for correction of the award to the arbitral tribunal, so long as the time limit within which the parties can object the arbitral award, does not expire.²¹⁹

In practice, in the case of Civ. W. Co. (Construction company) v. I. G. Ins. Co. (Insurance company), the arbitral tribunal corrected, on its own motion, some mathematical errors in the arbitral award on the original copy of such award. This was according to Article 42 of the Implementation Rules.²²⁰

6.7.3.2 Interpretation of the award

The Implementation Rules of 1985 contain a provision under which either party may request the arbitral tribunal to interpret any ambiguity in the original award. The arbitral tribunal does not have the power to clarify the ambiguous award on its own initiative.

The interpretation of the arbitral award does not mean that a new award is rendered. In fact, it is considered as a part of the original award. Moreover, the decision of the arbitral tribunal concerning the interpretation of the ambiguous award may be objected according to the same rules governing means of objection of the original.²²¹

²¹⁹ *SĀLIM, Ṣalāḥ.*, supra note (28), p. 57.

²²⁰ The Arbitral Award No. 9/1407, dated 06/03/1408 A.H. (1988 A.D.).

²²¹ The Implementation Rules of 1985, Art. 43.

In addition, the Implementation Rules of 1985 are silent with respect to the time limit within which the parties should submit the request for interpretation of the arbitral award to the arbitral tribunal. It is highly desirable to apply the same issue concerning the time limit of correction of the arbitral award.²²²

In practice, the members of the arbitral tribunal usually examine the language and the text of the arbitral award carefully before declaring it in the presence of the parties to the dispute and their representatives.

In fact, giving of the arbitral tribunal the power to correct and interpret the arbitral award means that the Saudi legislator attempts to treat any obstacles arising during the arbitral process and to invite the businessmen community and companies to resolve their disputes by the means of arbitration.

However, it is convenient that the Saudi legislator reviews the provisions regarding the correction and interpretation of the arbitral award existing in the Arbitration Regulation of 1983 and its Implementation Rules of 1985 and determines a specific time limit to correct and interpret the arbitral award and deal with the effects and consequences arising out of the infringement of such provisions.

²²² See above, p. 331.

6.8 Finality of the award

A final award is the decision of the arbitral tribunal which disposes of all issues of the dispute submitted to the arbitration. The arbitral tribunal usually makes a final award to decide all issues of the dispute at the end of the arbitral process in which the parties to the dispute had presented their written pleadings, statements of evidence and documents which support their claims.

The national arbitration laws of various countries differ in respect of the time limit within which the arbitral award becomes final and binding. Some national arbitration laws such as the English law, state that the arbitral award is final from the date on which it is made by the arbitrators. The new English Arbitration Act of 1996 provides that:

“ Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.”²²³

Certain other arbitration laws, such as the Swiss law, consider that the arbitral award is final from the date on which it is communicated to the parties to the dispute. The Swiss Private International Law Act of 1987 states that:

“ The award is final from the moment of its communication.”²²⁴

In addition, some international and institutional rules of arbitration contain provisions which state that the arbitral award is final from the date on which it is rendered. The LCIA Arbitration Rules explicitly provide that:

“ Awards shall be final and binding on the parties as from the date they are made.”²²⁵

²²³ The new English Arbitration Act of 1996, Sec. 58 (1).

²²⁴ The Swiss Private International Law Act of 1987, Art. 190 (1).

²²⁵ The LCIA Arbitration Rules, Art. 16 (8).

However, although such arbitration laws and rules consider the arbitral award is final, whether from the date of its issue or from the date of its notification to the parties, such award may be objected to, according to the agreement of the parties or the applicable law of the arbitral process, before the authority originally having jurisdiction over the dispute, such as the courts.

In this case, the finality of the arbitral award means that such award is ready to be enforced by an order made by the competent authority. Accordingly, the arbitral award is final when it disposes of all issues of the dispute and the time limit within which it may be objected before the competent authority has run without any objection made by either party, or if the competent authority refused the objection presented to it and it issued an order to enforce the arbitral award.²²⁶

There are some effects which arise from the finality of the arbitral award, such as the relationship between the parties to the dispute and the arbitrators disappears. As well, the arbitral award acquires the status of *res judicata* where the subject-matter of the dispute decided by such award is not subject to be submitted to the other authorities, whether a new arbitral tribunal or the courts, to decide it again.

Res judicata will be discussed in detail later on in the next chapter when the question of challenge of the arbitral award is treated.²²⁷

6.8.1 The position in the Kingdom of Saudi Arabia

At the end of arbitration proceedings, the arbitral tribunal usually makes a final award which disposes of all issues of the subject-matter of the dispute. The Arbitration Regulation of 1983 expressly states that:

“ The parties may submit their objections against what is issued by the

²²⁶ FIRTH, Thomas V., *The Finality of a Foreign Arbitral Award.* , 1970, vol. 25, no. 1. The Arbitration Journal, p. 5.

²²⁷ For details, see below, pp. 345-46.

arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final.”²²⁸

According to such Article, the arbitral award will become final, if either party to the dispute has not submitted an objection against such award to the authority originally having jurisdiction over the dispute within fifteen days from the date of notification of the award. However, if a party submits an objection against the arbitral award within the legal time limit the competent authority will hear such objection and decide either to refuse it and issue an enforcement order, or to accept such objection and make a decision thereon. In this case, the arbitral award is considered final from the date on which the competent authority refuses the objection and makes an order to enforce it.

When the arbitral award becomes final, it is considered as having the same status as a judgment made by the authority originally having jurisdiction over the dispute. As well, the award acquires the status of *res judicata* so that a party will not be allowed to refer the subject-matter of the decided dispute to a new arbitral tribunal or to a judicial body, such as the courts, to decide it again.

²²⁸ The Arbitration Regulation of 1983, Art. 18.

Chapter seven

Challenge, recognition and enforcement of the arbitral award

The issue of the arbitral award does not mean that the dispute between the parties has been settled because the arbitral award should be final and enforceable. Either party to the dispute, almost always the loser, may attempt to challenge the arbitral award before the competent authority, such as the courts. The winning party may have to resort to enforce the award.

Recognition and enforcement of the arbitral award without delay are one of the most important aims which lead the business community to resort to arbitration for disputes arising out of commercial transactions.

Recognition and enforcement of the arbitral awards, whether national or foreign awards, usually depend on the positions of the countries in respect of the arbitration as a method of resolving disputes. If countries uphold recognition and enforcement of the arbitral awards the resort to arbitration to settle disputes will grow considerably. However, if they abandon and refuse recognition and enforcement of the arbitral awards the resort to arbitration will decrease.

This chapter will deal with two major aspects which are challenge, recognition and enforcement of the arbitral award. In fact, the type of arbitration affects the procedural law which will govern the challenge, recognition and enforcement of the award because the procedural law governing the challenge, recognition and enforcement of national arbitral awards often differs from that governing the challenge, recognition and enforcement of foreign arbitral awards.

This chapter is divided into three sections as follows:

- Introduction.
- Challenge of the arbitral award.
- Recognition and enforcement of the arbitral award.

This chapter will first discuss various aspects relating to challenge, recognition and enforcement of the arbitral award and explain the different positions

of the national arbitration laws of various countries, and the international and institutional rules of arbitration. It will then discuss the position in the Kingdom of Saudi Arabia according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

7.1 Introduction

To begin with, it is desirable to distinguish between what is meant by national and foreign arbitral awards. There are certain criteria by which it is possible to determine the type of the arbitral award. The major criteria are the place where the arbitral award is made, the nationality of the parties to the dispute and arbitrators, and the law governing the arbitral process.¹

An arbitral award may be a national award when it has been made within the territory of the country whose courts are involved. Most countries, such as Belgium adopt by their laws, courts or legal writers that an arbitral award is a national award when it has been made within the territory of the country, according to the national law of the country and at least one of the parties to the dispute has the nationality of the country or he is resident in that country.²

Moreover, certain countries expand the scope of the national arbitral awards. For example, in France, an arbitral award rendered in a foreign country will be considered as a French national award, if the arbitral process has been conducted according to the French Code of Civil Procedure Act which was selected by the parties as the law governing the arbitral process in the arbitration agreement.³

In addition, in Sweden, most Swedish legal writers think that an arbitral award is considered as a Swedish award in all cases when it has been made in Sweden even if the dispute has no direct connection with Sweden, and all the parties to the dispute are foreigners to and non-resident in Sweden. However, there is not any judicial decision which can be cited in support of this doctrine in Sweden.⁴

¹ For further details, DAVID, René., *Arbitration in International Trade*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1985, pp. 362-64; also LALIVE, Pierre., “*Enforcing Award*” in *60 Years of ICC Arbitration-A Look at the Future*, Paris, ICC Publishing S.A., 1984, p. 327.

² NELISSEN, J. M., *The annulment of arbitral awards in Belgium*, November 1986, vol. 5, Part. 11, International Financial Law Reviews, p. 35.

³ DAVID, René., supra note (1), p. 362.

⁴ Ibid., p. 362; also LALIVE, Pierre., supra note (1), p. 327.

On the other hand, an arbitral award is considered as a foreign award when it is made in a country other than the country in which recognition and enforcement of such award are sought, or if the arbitral process is conducted according to a foreign law or one of the international and institutional rules of arbitration, such as the ICC Arbitration Rules, or if the parties to the dispute are foreigners or non-resident in the country where the arbitration takes place.⁵

Most countries, such as England⁶ follow this criterion. For example, in *Hiscox v. Outhwaite* case, the House of Lords decided that the arbitral award dated and signed in Paris was considered as a foreign arbitral award, in spite of the fact that the sole arbitrator was English, the arbitration took place in London and the English law was the applicable law of the arbitral process.⁷

Besides, the New York Convention of 1958 considers the arbitral award as a foreign award when it is made in a country other than the country where it is enforced or when the country of enforcement of the arbitral award does not consider such award as a domestic award.⁸

⁵ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *International Chamber of Commerce Arbitration*, 2nd Ed., New York, London & Rome Oceana Publications, INC.,; and Paris, ICC Publishing S. A., 1991, pp. 476-7.

⁶ WALTON, Anthony & VITROIA, Mary., *Russell on the Law of Arbitration*, 20th Ed. , London, Stevens & Sons Ltd, 1982, p. 377.

⁷ *Hiscox v. Outhwaite* case, 3 W.L.R., 09/08/1991, pp. 303 *et esq.*

⁸ The New York Convention of 1958, Art. I (1).

7.2 Challenge of the arbitral award

In this section, it would be convenient to discuss the most important issues regarding challenge of the arbitral awards, whether national or foreign awards. This section is divided into three sub-sections as follows:

- Challenge of the national arbitral awards.
- Challenge of the foreign arbitral awards.
- The position in the Kingdom of Saudi Arabia.

7.2.1 Challenge of national arbitral awards

Either party to the dispute, almost always the losing party, may submit a request for challenge of an arbitral award to the competent authority. A challenge is a procedural step related to the validity of the arbitral award in an endeavour to set aside such award or at least to vary it in some way to the benefit of the party making the request for the challenge.

In principle, it is possible for either party to the dispute to challenge the arbitral award before the competent authority, such as the courts. Most national arbitration laws of various countries, such as English⁹ and French¹⁰ laws expressly give the parties to the dispute the right to challenge the arbitral award. For example, the Netherlands Arbitration Act of 1986 provides that:

“ Recourse to a court against a final or partial final arbitral award which is not open to appeal to a second arbitral tribunal, or a final or partial final award rendered on arbitral appeal, may be made only by an application for setting aside or revocation in accordance with this Section.”¹¹

⁹ The new English Arbitration Act of 1996, Secs. 67 & 68.

¹⁰ The French Code of Civil Procedure of 1980, Art. 1481.

¹¹ The Netherlands Arbitration Act of 1986, Art. 1064 (1).

Indeed, it seems that the possibility of challenge of the arbitral award may lead to some advantages. For example, when the arbitral tribunal is aware that its award may be challenged before the competent authority, such as the court, it can be expected to administer the arbitral process duly and to respect fundamental legal principles, such as the principle of the equal treatment of the parties to the dispute, and the provisions of the applicable law of the arbitration.

However, the ability to challenge the arbitral award may lead to some disadvantages. Firstly, challenge of the arbitral award may be used simply to delay enforcement of such award which this contradicts one of the main aims of the arbitration as a means of resolving the disputes. Secondly, arbitration is a private means of settling the disputes and the request for challenge of an arbitral award referred to the court will be a hearing in public. Thirdly, challenge of the arbitral award may increase the expenses of the arbitration. Finally, the success of challenge will confirm judicial intervention over the award made by the arbitral tribunal.¹²

Moreover, some legal writers think that it may seem a strange position that the parties to the dispute challenge the arbitral award before the competent authority, in spite of including in their arbitration agreement that the arbitral award is final and binding.¹³

7.2.1.1 Waiver of challenge

The parties to the dispute may waive the right to challenge an arbitral award before the competent authority. Such waiver is usually included in the arbitration agreement.

Countries differ in respect of the ability of the parties to waive the right to challenge the arbitral award. Many countries, such as France and the United States¹⁴

¹² REDFERN, Alan & HUNTER, Martin., *Law and Practice of International Commercial Arbitration*, 2nd Ed. , London, Sweet & Maxwell, 1991, pp. 420-21.

¹³ Ibid., p. 420.

¹⁴ HOLTZMANN, Howard., *International Handbook on Commercial Arbitration, The United States*, Deventer, The Netherlands, Kluwer Law & Taxation, 1984, p. 28.

allow to the parties to waive the right to challenge the arbitral award and mention that in the arbitration agreement. For example, the French Code of Civil Procedure explicitly states that:

“ An arbitral award may be appealed unless the parties, in the arbitration agreement, waive their right to appeal. Nevertheless, it may not be appealed if the arbitrator has been empowered to act as *amiable compositeur*, unless the parties, in the arbitration agreement, expressly reserve the right to do so.”¹⁵

Some other countries, such as Switzerland limit the scope of the waiver of the challenge of the arbitral award and only allow the parties to the dispute to waive the right to challenge the arbitral award if such parties are foreigners. The Swiss Private International Law Act of 1987 expressly provides that:

“ Where none of the parties has its domicile, its habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Art. 190, Para. 2.”¹⁶

Countries of Latin America adopt different positions in respect of giving the parties to the dispute the right to waive the challenge of the arbitral award. In some countries, such as Argentina, the parties can waive the right to challenge the arbitral award, provided that they include such waiver in the arbitration agreement. By contrast, in some other countries, such as Colombia, the parties are not allowed to waive the right to challenge the award when they submit their dispute to the arbitration. In Brazil, either party to the dispute can challenge the arbitral award when any of the reasons for challenge mentioned in the Brazilian Civil Procedure Code appears even if the parties have included in the arbitration agreement a special clause which states that the parties to the dispute waive the right to challenge the award.¹⁷

¹⁵ The French Code of Civil Procedure of 1980, Art. 1482.

¹⁶ The Swiss Private International Law Act of 1987, Art. 192 (1).

¹⁷ For further details, DAVID, René., *supra* note (1), p. 375; also NATTIER, Frank E., *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements*

In addition, in certain countries, such as Egypt, according to the new Egyptian Arbitration Act of 1994, the waiver of the right to present a request for challenge of the arbitral award is only valid, if it is made after the arbitral award was rendered.¹⁸

In fact, giving the parties to the dispute the opportunity to waive the right to challenge the arbitral award and to consider the award as a final and binding award, will support the resort to arbitration as a means of resolving disputes because such step will lead to reducing the time taken and the expenses of the arbitration.

7.2.1.2 Competent authority to decide the challenge

Jurisdiction to decide the request for challenge of the arbitral award is often given to the courts at the place in which the arbitral award is made or registered, or to the court which is competent to hear the dispute if there were not an arbitration agreement between the parties to the dispute.

However, in certain countries, such as Argentina, a party to the dispute can present a request for challenge of the award to the arbitral tribunal itself. If the tribunal denies such request, the party can then take the request to the court at one level higher than the judge who would have heard the case in the absence of arbitration.¹⁹

In fact, countries differ in respect of the kind of courts which have jurisdiction to hear the request for challenge of the arbitral awards. Many countries, like Belgium²⁰ and the Netherlands give the courts of first instance where the arbitration takes place the jurisdiction to decide the challenge presented against the arbitral award by either of the parties to the dispute. For example, the Netherlands Arbitration Act of 1986 states that:

and Awards, Summer 1986, vol. 21, no. 3, Texas International Law Journal, pp. 411. +17.

¹⁸ EL-AHDAB, Abdul Hamid., *The New Egyptian Arbitration Act in Civil and Commercial Matters*, June 1995, vol. 12, no. 2, Journal of International Arbitration, p. 101.

¹⁹ NATTIER, Frank E., *supra* note (17), p. 411.

²⁰ The Belgian Judicial Code, Art. 1717.

“ An application for setting aside shall be made to the District Court with whose Registry the original of the award shall be deposited by virtue of Article 1058 (1).”²¹

Some other countries, such as Egypt²² and France give the power to decide the request for challenge of the national arbitral award to the Court of Appeal of the place where the arbitral award is made. For example, the French Code of Civil Procedure explicitly provides that:

“ Appeals and motions to set aside shall be brought before the Court of Appeal within whose district the arbitral award was rendered.”²³

In England, the new Arbitration Act of 1996 expressly states that the High Court or a county court has the jurisdiction to decide the request for challenge of the arbitral award submitted by either of the parties to the dispute, almost always the losing party.²⁴

According to the above arbitration laws, the losing party is obliged to bring the request for challenge of the arbitral award before the court at the place in which the arbitral award was made. Therefore, if he has submitted the request for challenge to another court, such court will refuse to hear this request because it does not have the jurisdiction.

The court having jurisdiction to decide the request for challenge of the arbitral award has a broad power to accept or refuse the request whereby it will make sure whether there are sufficient reasons to accept the request and it may then remit the award to the arbitral tribunal for reconsideration, or set it aside and decide the dispute or submit the dispute to a new arbitral tribunal.

²¹ The Netherlands Arbitration Act of 1986, Art. 1064 (2).

²² EL-AHDAB, Abdul Hamid., *supra* note (18), p. 100.

²³ The French Code of Civil Procedure of 1980, Art. 1486.

²⁴ The new English Arbitration Act of 1996, Sec. 105.

7.2.1.3 Reasons for challenge

The reasons, for which it is possible to challenge the arbitral award, vary from one country to another. In general, the national arbitration law of each country often states specific reasons for challenge of the arbitral award.

It is highly desirable to indicate the most important reasons for challenge of the arbitral award which are included in most national arbitration laws of various countries as follows:²⁵

- 1- If the arbitral award was rendered without the existence of an arbitration agreement or if the agreement to arbitrate was null and void or expired.
- 2- If either party to the dispute was fully or partially under incapacity according to the law governing the arbitral process.
- 3- If aspects of the award did not fall within the scope of the arbitration agreement, or if the arbitral tribunal exceeded its jurisdiction or if it omitted to decide some aspects which were within the scope of jurisdiction.
- 4- If the constitution of the arbitral tribunal or the appointment of a sole arbitrator was made in a manner contrary to the agreement of the parties or contrary to the provisions of the applicable law.
- 5- If the award does not contain the major elements required by the law governing the arbitration, such as if the award does not contain the reasons, the signature, names, addresses of the arbitrators, a summary of the claim of the parties, or the date and place where it was rendered.
- 6- If the award was rendered through the corruption or fraud of the party in whose favour it was made.²⁶

²⁵ For further details, MATRAY, Lambert., *International Handbook on Commercial Arbitration, Belgium*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, pp. 21-22; DAVIDSON, Fraser., *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, Edinburgh, Scotland, W. Green, 1991, pp. 197-210; EL-AHDAB, Abdul Hamid., *supra* note (18), pp. 97-100; also THOMAS, D. Rhidian., *International Commercial Arbitration Agreements and the Enforcement of Foreign Arbitral Awards-A commentary on the Arbitration Act 1975*, 1981, Lloyd's Maritime and Commercial Law, pp. 34-37.

²⁶ There are also other reasons for challenge of the arbitral awards. It can be summarised as follows:

- (a)- If the arbitral tribunal did not comply with the provisions of the law governing the subject-matter of the dispute.

Moreover, the court may set aside the arbitral award on its own initiative if such award is contrary to public policy or if the subject-matter of the dispute is not capable of settlement by arbitration.

In fact, a national arbitration law of each country often states some not all of these reasons for challenge of the arbitral awards.

Some countries, such as Switzerland tend to reduce the reasons on which the arbitral award may be challenged in an endeavour to make the arbitration as a manner of settling the disputes more effective.²⁷

7.2.1.4 Methods of challenge

There are certain methods, such as setting aside and review by which either of the parties may challenge the arbitral award before the court having jurisdiction to hear the challenge. The major methods of challenge of the arbitral awards are as follows:

7.2.1.4[i] Setting aside of the arbitral award

Either of the parties to the dispute has the right to have recourse to this method by submitting a request for setting aside of this award to the competent

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- (b)- If the award violated the arbitration proceedings determined by the parties in the arbitration agreement or the proceedings mentioned in the law governing the arbitral process.
 - (c)- If either party to the dispute was unable to present his defence as a result of not being duly notified of the appointment of an arbitrator, or the arbitration proceedings.
 - (d)- If the award was based on evidence which has been judicially declared or recognised as being false.
 - (e)- If the award was based on testimony judicially declared false.
 - (f)- If after the award was made, there has been discovered new evidence which would have had a decisive influence on the arbitral award.
 - (g)- If after the award was made, there has been found out that one of the parties to the dispute retained decisive evidence on the award.
 - (h)- If an arbitrator has misconducted himself or the arbitration proceedings, such as if the arbitrator received documents from one party without showing them to the other.
 - (i)- If the text of the arbitral award is contradictory in itself.

²⁷ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., supra note (5), p. 549.

authority, such as the court, when one or more serious reasons for setting aside of the arbitral awards appears. For example, when there is non-existent, void or expired arbitration agreement, or the arbitral award contains no reasons or it is not signed by the proper number of arbitrators.

Setting aside of the arbitral award will not often lead to remission of the award to the same arbitral tribunal for reconsideration. Where there is no remission the parties to the dispute will be without any award and they may submit the dispute to a new arbitral tribunal or to the court for its decision. However, if a part of the arbitral award, which deals with separate issues of the dispute, is set aside the competent authority may remit the whole award to the arbitral tribunal for consideration and modification of this part.

In addition, the competent authority such as the court may grant the arbitral tribunal the opportunity to contest the grounds on which setting aside is sought. However, if the tribunal refuses to take advantage of this opportunity the competent authority will decide the request for setting aside of the arbitral award. The UNCITRAL Model Law of 1985 explicitly states this.²⁸

7.2.1.4[ii] Review of the arbitral award

This method is resorted by either of the parties to the dispute, when there is a mistake in the application of one of the questions or provisions of the law governing the dispute or the arbitration, in spite of the diligence of the arbitrators. In this case, either of the parties to the dispute may bring a request for review of the arbitral award to the competent authority, such as the court, which will not set aside the award, but it will remit it to the arbitral tribunal for its reconsideration and modification according to the directions of the court. In England, the court remits the arbitral award to the arbitrators for reconsideration more often than it sets aside this award or declares the award to be of no effect because the remission of the award will save the

²⁸ The UNCITRAL Model Law of 1985, Art. 34 (4).

time and money of the parties to the dispute.²⁹ The new English Arbitration Act of 1996 explicitly confirms that matter.³⁰

Countries differ in respect of the adoption of one or more methods of challenge of the arbitral awards. Some countries, such as Egypt adopt only one method by which the parties to the dispute can challenge the arbitral award. For example, the new Egyptian Arbitration Act of 1994 indicates the reasons for setting aside or nullity of the arbitral award, but this Act does not admit the method of review of the arbitral award. It expressly provides that:

- “(1)- Arbitral awards rendered in accordance with the provisions of the present Law may not be challenged by any of the means of recourse provided for in the Code of Civil and Commercial Procedures.
(2)- An action for the nullity of the arbitration award may be instituted in accordance with the provisions of the following two articles.”³¹

As well, countries which have adopted the UNCITRAL Model Law of 1985, such as Scotland because according to Article 34 of this Law, the challenge of the arbitral award may be made only by an application for setting aside.

Some other countries, such as Switzerland, adopt both methods of challenge of the arbitral award (setting aside and review). There are specific reasons upon which the parties to the dispute may set aside or review the arbitral award. In Switzerland, for instance, the arbitral award may be set aside if one of the following reasons appears:

- If the arbitral tribunal was improperly constituted.
- If the arbitral tribunal erred as to its jurisdiction.
- If the tribunal decided matters not referred to it.
- If it did not respect the due rights of a party to the dispute.
- If it awarded a party something more or different from that claimed without authorisation.

²⁹ WALTON, Anthony & VITROIA, Mary., *supra* note (6), p. 396.

³⁰ The new English Arbitration Act of 1996, Sec. 68 (3).

³¹ The new Egyptian Arbitration Act of 1994, Art. 52.

- If it made an arbitrary award.
- If it made the award after the expiry of its mission.
- If it did not comply with the provisions required in the form of the award.
- If it fixed its fees at a manifestly excessive level.

If the court accepts this request it will set aside the arbitral award. In this case, the parties to the dispute will be without any award and they may then submit the case to a new arbitral tribunal or to the court for deciding the dispute.

Moreover, in Switzerland, either party to the dispute can submit a request for review of the arbitral award when one of the following reasons arises:

- If the arbitral award was affected by criminal acts, such as fraud.
- If it was rendered in ignorance of decisive evidence existing prior to the award where the claimant did not present it during the arbitration proceedings.

If the court accepts the request for review of the arbitral award, it will remit such award to the same arbitral tribunal for reconsideration.³²

In Sweden, the arbitral award may be challenged only for procedural defects which can be classified into two types: those that render an award *void* and those that render it *voidable*. An arbitral award may be *void* where there was no valid arbitration agreement, where the subject-matter of the dispute was not arbitrable, where the award was not in writing or signed by at least a majority of the arbitrators, or where the award has been procured by fraud, bribery, or criminal incident.³³

An arbitral award may also be *voidable* where the arbitral tribunal has acted outside the scope of its mandate, where the award was made after the expiry of the time limit, where the award was rendered in a case in which Sweden was not the proper forum, where an arbitrator was appointed improperly or where any other procedure irregularity occurred, in all probability, it may be assumed to have influenced the award.³⁴

³² For details, CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (5), pp. 550-52.

³³ The Swedish Arbitration Act of 1929, Sec. 20.

³⁴ *Ibid.*, Sec. 21.

On the other hand, in certain countries, such as the United States, some reasons, for example that there is not an arbitration agreement or the arbitral tribunal is without jurisdiction, which may lead to set aside the arbitral award, should be raised at an earlier stage before the issue of the arbitral award or a party to the dispute would be considered to have waived the right to challenge on those reasons if he participated in the arbitration proceedings.³⁵

7.2.1.5 Time limits for challenge

Most countries, which admit the possibility to challenge the arbitral award, specify a limited period within which the request for challenge of the award must be submitted to the competent authority. For example, in England, the law provides that any application or appeal of an arbitral award must be made within twenty eight days of the date of the award.³⁶ In France, the law requires that the request for challenge of the arbitral award should be referred to the competent authority as soon as the award has been made. But, before one month from the notification of such award to the parties.³⁷ In Sweden, the request for challenge of the award should be made within sixty days from the time that the parties to the dispute received an original or certified copy of the award.³⁸

In countries, which admit two methods of challenge of the arbitral award, the time limit for challenge differs according to the kind of the method of challenge. For example, in Switzerland, a party may make a request for setting aside of the arbitral award within thirty days from the notification of the award to the parties to the dispute, if there is one of the reasons for setting aside of the award appears.³⁹ Whilst if a party wishes to review the arbitral award the request for this review should be

³⁵ HOLTZMANN, Howard M., *supra* note (14), p. 28.

³⁶ The new English Arbitration Act of 1996, Sec. 70 (3).

³⁷ The French Code of Civil Procedure of 1980, Art. 1486.

³⁸ The Swedish Arbitration Act of 1929, Sec. 21.

³⁹ The Swiss Concordat Arbitration Act of 1969, Art. 37.

brought within sixty days of the date on which the party becomes aware of the reasons for review, but no later than five years after notification of the arbitral award.⁴⁰

Further, in certain countries, such as Belgium, the length of the time limit for challenge of the arbitral award varies according to the nature of the reasons for challenge. The Belgian Judicial Code, for instance, distinguishes in its Article 1707 between three cases:

1- A request for challenge of the arbitral award must be made within three months either from the date of the fraud, the document, or the other piece of evidence is discovered, or from the date the evidence was declared false or recognised as false, provided that a period of five years from the date the award was notified has not expired.

2- A request for challenge of the arbitral award must be made within three months from the day on which the award is notified to the parties to the dispute when this request is based on one of the following reasons: the arbitration agreement is invalid, or the tribunal has exceeded its jurisdiction, or it has omitted to decide certain points of the dispute, or the award was made by an arbitral tribunal improperly constituted, or if the parties have not been given an opportunity to present their case and defence, or the award was not made in writing or lacked the required number of signatures, or the reasons for the award have not been stated or the award contains conflicting provisions.

3- There is no particular time limit, when the arbitral award is challenged on the basis of the non-arbitrability of the dispute or the fact that it is contrary to public policy. In this case, the judge may examine these reasons on his own motion.

The question may arise in respect of the validity of the request for challenge of the arbitral award when this request is made after the expiry of the time limit for the challenge of the award.

In this case, the competent authority, such as the court has two alternatives: it may accept to hear the request for challenge or it may refuse that and then issue an

⁴⁰ Ibid., Art. 42.

enforcement order of such award. In fact, the decision of the competent authority will depend on the provisions of the applicable law of the arbitral process, and the circumstances and reasons which lead to refer the request for challenge after the time limit of the challenge.

Countries adopt different positions in respect of this question. Certain countries, such as Sweden consider that the right to challenge the arbitral award will be lost in this case. The Swedish Arbitration Act of 1929 explicitly states that:

“ An action to challenge the award must be commenced within sixty days from the time when the party received an original or a certified copy of the award. A party who fails to observe the said time limit forfeits his right to challenge the award.”⁴¹

However, in some other countries, such as Yemen, the court may accept the request for challenge of the arbitral award even if it was made after the expiry of the time limit of challenge, when there is a justified reason, such as a case of *force majeure* which will be appreciated by the court. The Yemeni Arbitration Act of 1992 expressly provides that:

“ The Court may accept a request for avoidance after the time-period if this delay is due to a case of *force majeure* and the request for setting aside is made as soon as possible after disappearance thereof.”⁴²

Moreover, in many other countries, such as France and Scotland the arbitration laws are silent in respect of this question. However, it can be concluded that the courts will not accept the request for challenge of the arbitral award presented after the expiry of the time limit of the challenge because the challenge of the award is considered exceptional and that will lead to save the time and reduce the expenses of the arbitration.

⁴¹ The Swedish Arbitration Act of 1929, Sec. 21.

⁴² The new Yemeni Arbitration Act of 1992, Art. 54.

In England, the court may accept the request for challenge of the arbitral award brought after the expiry of the time limit of challenge, if the losing party can persuade the court that there are serious and justified reasons leading to this delay.⁴³

7.2.1.6 Procedure for challenge

When the losing party submits a request for challenge of an arbitral award to the competent authority, such as the court this request will be notified to the other party according to the procedure stated in the applicable law. The competent authority to decide this request usually complies with the same procedure applied to the challenge of a judicial award.

The national arbitration laws, and institutional and international rules of arbitration do not require any special form in the application for challenge of the arbitral award. However, the application should contain the reasons on which the losing party bases his challenge to the arbitral award. The UNCITRAL Model Law of 1985 requires that.⁴⁴

The competent authority usually decides the request for challenge on the basis of the file of the case alone without additional pleadings.⁴⁵

7.2.1.7 Effects resulting from challenge

When the request for challenge of the arbitral award is referred to the competent authority, enforcement of such award will be suspended, unless the arbitral tribunal has granted provisional enforcement. As well, the competent authority may request the applicant making the challenge to give security for the expenses of the challenge and to pay into the court or otherwise secure the amount of

⁴³ For further details, WALTON, Anthony & VITROIA, Mary., *supra* note (6), pp. 442-44.

⁴⁴ The UNCITRAL Model Law of 1985, Art. 34 (2) a.

⁴⁵ NATTIER, Frank E., *supra* note (17), p. 412.

the arbitral award for making sure that the request for challenge is serious and is not for the purpose of delay. In this case, the competent authority may suspend the order of provisional enforcement.

Many countries, such as France, provide for the suspension of enforcement of the arbitral award when such award is challenged before the competent authority. The French Code of Civil Procedure, for instance, states that:

“ Execution of the arbitral award is suspended for the period during which these means of recourse may be exercised. Exercise of such recourse has a suspensive effect as well.”⁴⁶

However, in some other countries, such as Egypt, the challenge of the arbitral award does not lead to suspend enforcement of such award, unless the applicant of the challenge has requested the suspension of enforcement of the award in his request. The new Egyptian Arbitration Act of 1994, for instance, provides that:

“ The filing of an action for nullity does not suspend the enforcement of the arbitral award. Nevertheless, the court may order said suspension if the applicant requests it in his application and such request is based upon serious grounds.”⁴⁷

Sometimes, the competent authority, such as the court may suspend the challenge proceedings to give the arbitral tribunal the opportunity to contest the reasons for challenge. However, if the arbitral tribunal refuses to take advantage of this opportunity the competent authority will decide the request for challenge and set aside the arbitral award.⁴⁸

In fact, when a party to the dispute makes a request for challenge of an arbitral award the competent authority will have two alternatives. It may refuse or accept the request. If the competent authority refuses the request, the arbitral award will be immediately confirmed and the authority will issue an enforcement order of

⁴⁶ The French Code of Civil Procedure of 1980, Art. 1486.

⁴⁷ The new Egyptian Arbitration Act of 1994, Art. 57.

⁴⁸ DAVIDSON, Fraser., *supra* note (25), p. 213.

such award. However, if the competent authority accepts the request, the arbitral award will be set aside and lose its legal validity and effects. In this case, the parties to the dispute have certain choices. They may remit the dispute to the arbitral tribunal which will still have its original powers, but it should not exceed the scope of the order of the competent authority, or they may submit the dispute to a new arbitral tribunal which will decide the dispute anew or they may refer it to the same competent authority for its decision.

On the other hand, in many countries, such as France, it is possible that the competent authority, such as the court may decide by its own motion to hear the case anew when it sets aside the arbitral award. The French Code of Civil Procedure, for instance, explicitly provides that:

“ Whenever a court seized of motion to set aside does set the award aside, it decides on the merits of the case within the limits of the arbitrator’s mission, unless the parties are agreed to the contrary.”⁴⁹

However, certain other countries, such as Switzerland do not allow the competent authority, such as the court to modify or decide the arbitral award by its own motion when it sets aside that award.⁵⁰ In this case, the parties to the dispute have the choice to submit the dispute to a new arbitral tribunal or to the court for its decision.

Moreover, in some other countries, such as England, there are two stages in respect of the request for challenge of the arbitral award. The first is the loser argues before the competent authority that there are serious reasons why the authority should allow him to make the request for challenge. The second stage is when the competent authority accepts this request it will determine the matters.⁵¹

⁴⁹ The French Code of Civil Procedure of 1980, Art. 1485.

⁵⁰ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (5), p. 551.

⁵¹ MARSHALL, Enid A., *Gill: The Law of Arbitration*, 3rd Ed., London, Sweet & Maxwell, 1983, p. 93.

7.2.1.8 Other questions concerning challenge

There are some questions which may arise in respect of the challenge of a national arbitral award. For example, the arbitral award may sometimes contain several decisions which deal with separate issues of the dispute. If the request for challenge of this award relates to certain of these decisions, it is possible to set aside only that part of the arbitral award which concerns the challenged decisions, and the other part remains valid.⁵²

The question may arise as to the ability of a third party to challenge the national arbitral award.

The arbitral award usually only affects the parties to the arbitration agreement, but a third party may challenge the award when he has a legitimate interest in such challenge. The French Code of Civil Procedure gives a third party the ability to attack the arbitral award by submitting a special recourse called *tierce opposition* to the court.⁵³

Sometimes, an arbitrator may die after the issue of the arbitral award. In this case, if either of the parties to the dispute challenges the arbitral award and the competent authority accepts such challenge and sets aside the arbitral award, it may then remit the dispute to a new arbitrator who will be appointed by the parties or by the competent authority itself, where the parties are unable to agree upon a new arbitrator, or the competent authority may decide the dispute if it has the power to do so.

On the other hand, the question which may arise is whether or not the parties to the dispute can appeal the decision of the court concerning the request for challenge of the arbitral award.

Many countries, such as Egypt and France are silent in respect of this question. However, according to some other countries, such as England, it is possible for the parties to the dispute to appeal the decision of the High Court regarding the

⁵² WALTON, Anthony & VITROIA, Mary., *supra* note (6), pp. 430-31.

⁵³ The French Code of Civil Procedure of 1980, Art. 1481.

request for challenge of the arbitral award before the Court of Appeal in two situations as follows:

a- When the High Court or the Court of Appeal gives leave.

b- When it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.⁵⁴

It seems that leave to appeal the decision of the court concerning the request for challenge of the arbitral award may reduce the efficiency of the arbitration as a means of settling the disputes because such leave will tend to lengthen the arbitral process and increase the expenses of the arbitration.

7.2.1.9 *Res judicata*

The plea of *res judicata* is a plea in bar of any subsequent litigation in regard to the same determined matter between the same parties, their successors, representatives or assignees on the same grounds.⁵⁵

When the arbitral award becomes *res judicata* neither party to the dispute can bring the same dispute decided by the arbitral tribunal to the courts or to a new arbitral tribunal to hear again. In this case, the judge must refuse to examine the subject-matter of the dispute itself because it has been resolved by the arbitration and acquired the status of *res judicata*.

The main aims of *res judicata* are the losing party cannot start a new litigation or arbitration against the other party in respect of the same dispute, and the members of the arbitral tribunal have lost their jurisdiction with respect to such dispute after making the arbitral award.

The concept of *res judicata* is known in most civil law countries, such as Belgium, France and Germany where the award has the authority of *res judicata* as

⁵⁴ The new English Arbitration Act of 1996, Secs. 67, 68 & 69.

⁵⁵ For details, DICKSON, William G., *A Treatise on the Law of Evidence in Scotland*, vol. 1, Edinburgh & Glasgow, T. & T. Clark, 1887, pp. 266 *et esq.*

soon as it has been rendered by the arbitral tribunal.⁵⁶ However, in certain other countries, such as Yemen, the arbitral award becomes *res judicata* when it becomes enforceable after the expiry of the time limit for challenge of such award or when a request for challenge has been refused.⁵⁷

In common law countries, the concept of *res judicata* would seem to be unknown but the analogous doctrine of *estoppel by record* used. However, this latter doctrine cannot apply before the award has been declared executory by a public authority.⁵⁸ In fact, common law countries, such as England adopt the same concept of *res judicata* which is known in civil law countries without the need to declare an award executory by a public authority.⁵⁹

7.2.2 Challenge of foreign arbitral awards

A foreign arbitral award issued in a country other than the country in which its enforcement is sought, or according to a foreign arbitration law or one of the international and institutional rules of arbitration may be challenged by either of the parties to the dispute before the competent authority, such as the courts of the country where it was made.

This sub-section will deal with the different positions of the arbitration laws of various countries, and international and institutional rules of arbitration in respect of the question of challenge of foreign arbitral awards. As well, it will concentrate on the aspects which differ from those which apply to in the case of challenge of national arbitral awards which had been set forth in the above sub-section.⁶⁰

⁵⁶ DAVID, René., *supra* note (1), p. 356.

⁵⁷ EL-AHDAB, Abdul Hamid., *The New Yemeni Arbitration Act*, June 1994, vol. 11, no. 2, *Journal of International Arbitration*, p. 66.

⁵⁸ DAVID, René., *supra* note (1), p. 356.

⁵⁹ For further details, HOWARD, M. N. , CRANE, Peter & HOCHBERG, Daniel A., *Phillips on evidence*, 14th Ed., London, Sweet & Maxwell, 1990, pp. 850 *et seq.*

⁶⁰ See above, pp. 340 *et seq.*

Some countries, such as Australia, Greece⁶¹ and Belgium⁶² do not allow challenge of a foreign arbitral award before their courts. By contrast, some other countries, such as Egypt⁶³ and Sweden⁶⁴ give the parties to the dispute the right to challenge a foreign arbitral award when it is made in their territories or when its enforcement is sought inside them. Such countries usually provide for a specific court which has the competence to decide the request for challenge of a foreign arbitral award. For example, the new Egyptian Arbitration Act of 1994 gives the jurisdiction to the Cairo Court of Appeal, unless the parties to the dispute agree upon the competence of another appellate court in Egypt.⁶⁵

Certain other countries, such as France distinguish between the arbitral award issued inside France in an international arbitration⁶⁶ and the foreign arbitral award issued outside France. The former may be challenged before the Court of Appeal having jurisdiction at the place where this award was made, whereas the later is not subject to challenge by the parties to the dispute in France.⁶⁷

On the other hand, some institutional rules of arbitration, such as the ICC Arbitration Rules and the LCIA Arbitration Rules⁶⁸ do not permit that the arbitral award made according to their rules is challenged by either of the parties to the dispute. They consider the parties to the dispute have waived the right to challenge when such parties have selected these rules as the rules governing the arbitral process. The ICC Arbitration Rules, for instance, explicitly state that:

⁶¹ RUBINO-SAMMARTANO, Mauro., *International Arbitration Law*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1990, pp. 470-73.

⁶² STORME, Marcel. & DEMEULENAERE, Bernadette., *International Commercial Arbitration in Belgium*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1989, p. 84.

⁶³ EL-AHDAB, Abdul Hamid., *supra* note (18), p. 100.

⁶⁴ DAVID, René., *supra* note (1), p. 382.

⁶⁵ The new Egyptian Arbitration Act of 1994, Art. 9.

⁶⁶ An arbitral award issued in France is considered as an international arbitral award when it relates to a dispute which implicates international trade interests.

⁶⁷ CRAIG, W. Laurance, PARK, William W. & PAULSSON, Jan., *supra* note (5), pp. 494-95.

⁶⁸ The LCIA Arbitration Rules, Art. 16 (8).

“ By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.”⁶⁹

In addition, certain institutional rules of arbitration, such as the AAA Arbitration Rules are silent in respect of the possibility to challenge the arbitral awards made according such rules. However, it is, in principle, possible to challenge the arbitral awards.⁷⁰

Many international conventions governing arbitration give the parties to the dispute the right to challenge the arbitral award. For example, the Washington Convention of 1965 provides that:

“ Either party may request annulment of the award by an application in writing addressed to the Secretary-General.”⁷¹

As well, the UNCITRAL Model Law of 1985 grants the parties to the dispute the right to challenge of the arbitral award before the court of the country where the arbitration took place. It explicitly states that:

“ Recourse to a court against an arbitral award may be made only by an application for setting aside.”⁷²

7.2.2.1 Waiver of challenge

The parties to the dispute may agree to waive the right to challenge a foreign arbitral award and they may consider that award as a final and enforceable award.

⁶⁹ The ICC Arbitration Rules, Art. 24 (2).

⁷⁰ HOLTZMANN, Howard M., *supra* note (14), p. 27.

⁷¹ The Washington Convention of 1965, Art. 52 (1).

⁷² The UNCITRAL Model Law of 1985, Art. 34 (1).

Some countries, such as Egypt are silent with respect to the ability of the parties to the dispute to waive the right to challenge foreign arbitral awards. However, some other countries give the parties the opportunity to waive the right to challenge foreign arbitral awards by making an exclusion agreement before or after the commencement of the arbitration or the dispute arises.

In Switzerland, the Swiss Private International Law Act of 1987 expressly gives foreign parties to the dispute, who do not have a habitual residence or a business establishment in Switzerland, the possibility to waive the right to challenge their arbitral award or they can limit the reasons for challenge by concluding a written exclusion agreement.⁷³

Most international and institutional rules of arbitration, such as the Washington Convention of 1965 and the UNCITRAL Model Law of 1985 do not contain any provision in respect of the ability of the parties to the dispute to waive their right concerning the challenge of foreign arbitral awards.

7.2.2.2 Competent authority to decide the challenge

In principle, the parties to the dispute bring the request for challenge of a foreign arbitral award before the competent authority, such as the court of the country in which the arbitral award was made. However, in international arbitration, the parties to the dispute have the right to select a procedural law different from the law of the place of arbitration as the law governing the arbitral process. Therefore, the request for challenge of a foreign arbitral award may have to be addressed to the court of the country whose procedural law has been applied.⁷⁴

Many countries, such as France⁷⁵ give the jurisdiction to hear the request for challenge of a foreign arbitral award to the Court of Appeal of the place where such award is made. As well, some other countries, such as Egypt determine a specific

⁷³ The Swiss Private International Law Act of 1987, Art. 192 (1).

⁷⁴ RUBINO-SAMARTANO, Mauro., *supra* note (61), p.463.

⁷⁵ The French Code of Civil Procedure of 1981, Art. 1505.

court of appeal as the competent authority to decide the request for challenge of foreign arbitral awards. The new Egyptian Arbitration Act of 1994 specifies the Cairo Court of Appeal as the court having jurisdiction over the request for challenge of foreign arbitral awards, unless the parties to the dispute have agreed upon another Egyptian court of appeal.⁷⁶

In international commercial arbitration, the parties to the dispute have a freedom to select a procedural law of a country other than that in which the arbitration takes place, as the law which governs the arbitral process. Accordingly, challenge of arbitral award issued in international commercial arbitration may be made before the court of the place of arbitration or the court of the country whose procedural law governs the arbitral process. For example, the New York Convention of 1958 itself recognises that recognition and enforcement of a foreign arbitral award may be refused on the basis that the award has been set aside or suspended by the competent authority of the country in which, or under the law of which, the award was made.⁷⁷

If the law of a particular country contains specific procedures which the parties prefer, the parties may select only these procedures rather than the whole law of procedure which may conflict with the law of the country where the arbitration takes place.⁷⁸

The Washington Convention of 1965 reserves the challenge of the arbitral awards to its Centre. It explicitly states that:

“ Either party may request annulment of the award by an application in writing addressed to the Secretary-General.”⁷⁹

As well, the arbitration rules of some international trade associations, such as the GAFTA Arbitration Rules allow to the parties to the dispute to challenge the

⁷⁶ The new Egyptian Arbitration Act of 1994, Art. 9.

⁷⁷ The New York Convention of 1958, Art. V (1) e.

⁷⁸ REDFERN, Alan & HUNTER, Martin., *supra* note (12), p. 431.

⁷⁹ The Washington Convention of 1965, Art. 52 (1).

arbitral awards issued under these rules before a Board of Appeal which is appointed according to such Rules.⁸⁰

7.2.2.3 Reasons for challenge

Many countries, such as Egypt do not distinguish between the reasons for challenge of foreign arbitral awards and those for challenge of national arbitral awards.⁸¹

Certain other countries, such as France and Switzerland determine specific reasons on which either of the parties to the dispute can challenge international arbitral awards rendered in their territories. These reasons can be summarised as follows:

- If the arbitral tribunal issued its award in the absence of an arbitration agreement or on the basis of a void or expired agreement.
- If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed.
- If the arbitrator violated the mission conferred on him.
- If due process was not respected.
- If the recognition and enforcement would be contrary to international public policy.⁸²

Also, many international conventions governing the arbitration contain provisions which determine the reasons on which the arbitral awards may be challenged by either of the parties to the dispute. For example, the Washington Convention of 1965 specifies the following reasons:

- The arbitral tribunal was not properly constituted.
- The arbitral tribunal has manifestly exceeded its powers.

⁸⁰ For details, the GAFTA Arbitration Rules, Art. 8 (2).

⁸¹ The new Egyptian Arbitration Act of 1994, Art. 53.

⁸² The French Code of Civil Procedure of 1981, Art. 1502; also the Swiss Private International Arbitration Law Act of 1987, Art. 190 (2).

- There was corruption on the part of a member of the tribunal.
- There has been a serious departure from a fundamental rule of procedure.
- The award has failed to state the reasons on which it is based.⁸³

Moreover, the UNCITRAL Model Law of 1985 expressly states specific reasons for challenge of the arbitral award. The competent authority may accept to decide the request for challenge of the arbitral award at the request of either of the parties to the dispute when one of the following reasons appears:⁸⁴

- If one of the parties was under some incapacity.
- If the arbitration agreement is void or expired according to the applicable law of the arbitration.
- If the party making the request for challenge was not granted proper notice of the appointment of an arbitrator or the arbitral procedures or was otherwise unable to present his case.
- If the arbitral award deals with a dispute not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement.
- If the constitution of the arbitral tribunal or the arbitration proceedings was not in accordance with the arbitration agreement.

Moreover, according to this Law, the competent authority, such as the court can set aside the arbitral award by its own motion if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the country where the award is enforced or if this award is contrary to public policy of the country where enforcement of the award is sought.

⁸³ The Washington Convention of 1965, Art. 52 (1). For further details, PIRRWITZ, Bjorn., *Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and National of Other States*, Winter 1988, vol. 23, no. 1, Texas International Law Journal, p. 83.

⁸⁴ The UNCITRAL Model Law of 1985, Art. 34 (2).

7.2.2.4 Time limits for challenge

In general, there is a specific period within which either of the parties to the dispute may challenge a foreign arbitral award or this award will be final and enforceable.

Many countries, such as Egypt determine the same time limit within which it is possible to challenge the arbitral awards, whether these awards are national or foreign. The new Egyptian Arbitration Act of 1994 does not distinguish between national and foreign arbitral awards with respect to the reasons for challenge, the time limits and the procedure of challenge. It provides that:

“ The action for nullity of the arbitral award must be brought within the ninety days following the date the notification of the arbitral award to the party against whom it was rendered.”⁸⁵

As well, the French Code of Civil Procedure requires that an arbitral award, whether national or international must be challenged within the month following notification of such award and its *exequatur* to the parties to the dispute.⁸⁶

Moreover, some international conventions and rules of arbitration, such as the Washington Convention of 1965 and the UNCITRAL Model Law of 1985⁸⁷ state a specific period for challenge of foreign arbitral awards, but the beginning of this period varies according to the nature of reasons for challenge. For example, the Washington Convention of 1965 states that:

“ The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovering of the corruption and in any event within three years of the date on which the award was rendered.”⁸⁸

⁸⁵ The new Egyptian Arbitration Act of 1994, Art. 54 (1).

⁸⁶ The French Code of Civil Procedure, Arts. 1486 & 1505.

⁸⁷ The UNCITRAL Model Law of 1985, Art. 34 (3).

⁸⁸ The Washington Convention of 1965, Art. 52 (2).

The question which may arise is whether or not the request for challenge of a foreign arbitral award is valid, when it is made after the expiry of the time limits for it.

Certain arbitration laws, such as the French Code of Civil Procedure provide that challenge of an international arbitral award rendered in France will be barred, if the request for such challenge has been brought after the expiry of the period specified in the Act. It explicitly provides that:

“ Such action (an action to set aside) may be heard as soon as the award has been rendered; it is barred if it has not been brought within the month following notification of the award and its *exequatur*. ”⁸⁹

Some international conventions of arbitration, which determine a specific period for challenge of the arbitral awards, such as the Washington Convention of 1965 are silent with respect to the validity of the request for challenge submitted after the expiry of the time limit.

The UNCITRAL Model Law of 1985 does not allow the losing party to bring the request for challenge of the arbitral award to the competent authority, if the time limit of challenge has expired. It states that:

“ An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award. ”⁹⁰

It seems that non-acceptance of the request for challenge of the foreign arbitral award referred after the expiry of the time limits will support the main aims of the arbitration as a means of settling the disputes, particularly the speed and expenses of arbitration. However, it is desirable that the competent authority to hear such request for challenge considers the unforeseen circumstances and reasons which lead to such delay before refusing the request for challenge.

⁸⁹ The French Code of Civil Procedure of 1981, Art. 1505.

⁹⁰ The UNCITRAL Model Law of 1985, Art. 34 (3).

7.2.2.5 Procedure for challenge

There is not any specific form for the request for challenge of a foreign arbitral award. The French Code of Civil Procedure, for instance, does not impose any formalities in respect of the request for challenge of an international arbitral award issued in France.

The request for challenge of a foreign arbitral award should contain the reasons on which the challenge is based. It will be notified to the other party and the competent authority to hear the challenge will examine the request and the reasons mentioned in it.

Moreover, some international conventions and rules of arbitration, such as the UNCITRAL Model Law of 1985 do not require any formalities in the request for challenge of the foreign arbitral award.

However, if the challenge of the arbitral award is made under the auspices of ICSID the Washington Convention of 1965 contains provisions which govern the procedure of challenge. According to such provisions, the request for challenge should be submitted to the Chairman of ICSID who will appoint an *ad hoc* Committee of three persons from the Panel of Arbitrators to decide this request. The members of this Committee should not have the nationality of one of the arbitrators who have made the arbitral award or the nationality of one of the parties to the dispute, or who have been appointed as members of the Panel of Arbitrators by the State party to the dispute or who have been previously connected in any way with the dispute.⁹¹

7.2.2.6 Effects resulting from challenge

If the request for challenge of a foreign arbitral award is referred to the competent authority, such as the court then the execution of the arbitral award will in general be suspended until the competent authority issues its decision concerning

⁹¹ The Washington Convention of 1965, Art. 52.

such request because the arbitral award must be final and enforceable before its execution.

The competent authority may refuse or accept the challenge of a foreign arbitral award submitted by either of the parties. If it refuses the request for challenge, the arbitral award will be automatically confirmed and enforced. However, if it accepts the validity of the challenge, the arbitral award will lose its legal validity and effects.

In fact, the nature of the reasons, on which the request for challenge of a foreign arbitral award is based, affects the possibility of enforcement of such award. For example, when a foreign arbitral award is set aside because it is contrary to public policy of the country where it was made, the competent authority in the country where enforcement of such award is sought may issue an *exequatur*, even if this award is set aside on the basis that it is contrary to public policy of the country in which it was made because public policy may differ from a country to another.

In some countries, such as France, the competent authority, for instance. Paris Court of Appeal may enforce a foreign arbitral award, even if it has been set aside in the country where it was made.⁹² As well, if the arbitral award issued in France in an international arbitration has been set aside by a French court, the court can not adjudicate the case.⁹³

Indeed, the parties to the dispute have some alternatives in this case. They may remit the arbitral award to the same arbitral tribunal for reconsideration, or submit the dispute to a new arbitral tribunal or refer the case to the court which will decide it in different way.

According to the New York Convention of 1958, if the arbitral award has been set aside in the country where it was made, it will lose its validity and effect in this country and also in any country which is a member in the Convention.⁹⁴

⁹² REDFERN, Alan & HUNTER, Martin., supra note (12), p. 471.

⁹³ DAVID, René., supra note (1), p. 382.

⁹⁴ The New York Convention of 1958, Art. V (1) e.

However, according to the European Convention of 1961, if the arbitral award has been set aside in the country where it was made for a reason other than the reasons specified in the Convention, it will not be considered in other contracting countries that such award has been set aside and it may be enforced in these countries.⁹⁵

7.2.3 The position in the Kingdom of Saudi Arabia

An arbitral award is considered as a Saudi award, when it is made inside the Kingdom of Saudi Arabia and according to the Saudi procedural and substantive laws. However, it is doubtful whether an arbitral award based on a foreign law should be considered as a Saudi award even if it was made inside the Kingdom of Saudi Arabia.⁹⁶

In fact, there are not any special arbitration rules governing foreign arbitral awards issued inside or outside the Kingdom of Saudi Arabia. However, the Kingdom of Saudi Arabia has ratified some international conventions governing the arbitration and enforcement of foreign arbitral awards. For example, the Kingdom of Saudi Arabia has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in 1958⁹⁷ and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States concluded in 1965.⁹⁸

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 govern all the aspects concerning challenge of Saudi arbitral awards. The competent authority to deal with foreign arbitral awards, which is the Board of Grievances, will

⁹⁵ The European Convention of 1961, Art. IX.

⁹⁶ SALEH, Samir., *Commercial Arbitration in the Arab Middle East*, London, Graham & Trotman, 1984, p. 319.

⁹⁷ The Royal Decree No. M/11, DATED 16/07/1414 A.H. (1994 A.D.).

⁹⁸ The Kingdom of Saudi Arabia signed the Washington Convention of 1965 on 28/09/1979 A.D. and ratified it on 8/5/1980 A.D.

in practice apply the same procedure concerning the challenge of foreign judgments, if foreign arbitral awards submitted to it for their enforcement are challenged by either of the parties, unless such awards were made according to the rules of one of the international conventions ratified by the Kingdom of Saudi Arabia.

The Arbitration Regulation of 1983 gives either of the parties to the dispute the right to challenge the national arbitral award before the authority originally having jurisdiction over the dispute. It explicitly provides that:

“ The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed.”⁹⁹

One legal writer criticises giving of the parties to the dispute the right to challenge the arbitral award because challenge of arbitral awards will delay the issue of enforcement orders concerning them. Accordingly, he thinks that it would be better, in this case, to refer the dispute directly to the court to decide it by itself than refer it to arbitration.¹⁰⁰

However, it seems that although the possibility of challenging an arbitral award may lead to the consumption of more time and to increase the expenses of arbitration, it will make the arbitrators conduct the arbitral process carefully and respect fundamental legal principles, especially if the competent authority is obliged to decide the request for challenge of the arbitral award within a specific period.

The question which may arise is whether or not the parties to the dispute can waive the right to challenge the arbitral award when they enter into the arbitration agreement.

In fact, the waiver of the right to challenge the arbitral award depends on the kind of the dispute referred to the arbitration. The parties to the dispute can waive the right to challenge the arbitral award concerning labour disputes according to Article 183 (2) of the Labour and Workmen Regulation of 1969. Moreover, the Ministry of

⁹⁹ The Arbitration Regulation of 1983, Art. 18.

¹⁰⁰ NADER, M. J., *Conciliation and Arbitration in Saudi Arabia under the Chambers of Commerce and Industry*, Jeddah, The Kingdom of Saudi Arabia, Sahar Printing Press, Undated, p. 21.

Commerce encourages the parties to the dispute to include in the arbitration agreement a clause which stipulates the finality of the arbitral award and the waiver of the right to challenge in arbitrations which fall under its auspices, such as insurance arbitrations.¹⁰¹

However, in the other arbitrations, such as those administered under the auspices of the Board of Grievances the authority having jurisdiction to hear the dispute will not respect the waiver of the right to challenge the arbitral award included in the arbitration agreement.¹⁰² This authority will retain its power to control the award which will only be final, when an enforcement order is made by this authority.

In the Kingdom of Saudi Arabia, the arbitral tribunal does not have the power to decide the request for challenge of an arbitral award. As well, there is not any appeal arbitral tribunal which may hear such request. The competent authority, such as the Commercial Circuits in the Board of Grievances, usually hears the request for challenge of the arbitral award. The authority may refuse this request and issue an enforcement order or it may accept it and decide the dispute anew by itself.

The Arbitration Regulation of 1983 expressly gives the competent authority the power to hear and decide the request for challenge of an arbitral award. It states that:

“ If the parties or one of them submitted an objection against the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall consider the dispute and shall either dismiss the objection and issue an order for execution of the award, or accept the objection and decide the case.”¹⁰³

It is unclear whether the competent authority is authorised to make a full review of the merits of the dispute before rendering its decision on the request for

¹⁰¹ NADER, M. J., *Aspects of Saudi Arabian Law*, Jeddah & Riyadh, The Kingdom of Saudi Arabia, 1990, p. 9.

¹⁰² LERRICK, A. & MIAN, Q. J., *Saudi Business and Labour Law*, London, Graham & Trotman, 1982, p. 193.

¹⁰³ The Arbitration Regulation of 1983, Art. 19.

challenge of the arbitral award or not. Indeed, there is nothing in the Arbitration Regulation of 1983 which limits the scope of the authority's review or gives the authority the power to review the merits of the dispute. Certain legal writers think that the competent authority may not review the merits of the dispute except in the event of the violation of principles of *Shari'ah* and of public policy.¹⁰⁴ By contrast, some other legal writers and the practical reality confirm the ability of the competent authority to examine the merits of the dispute before making its decision on the request for challenge of the arbitral award.¹⁰⁵

In fact, it is important that the competent authority examines only the reasons on which the request for challenge of the arbitral award is based without reviewing all the merits of the dispute because this review may consume much time and increase the expenses of arbitration.

On the other hand, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not indicate the procedure which should be followed by the competent authority, when this authority decides the validity of a challenge to an arbitral award, for example, whether the parties should appear before such authority or whether there should be special sessions to hear the challenge. The challenge is examined according to the procedure normally followed before the competent authority when a judgment is challenged.

In practice, the competent authority examines the challenge made by either of the parties to the dispute without the presence of the parties or their representatives and it then issues its decision on this matter, but if the authority needs some clarifications concerning the challenge it may summon any party to the dispute before it. For example, in the case of S. T. Co. (Construction company) v. Mr. A. A. A. (Saudi natural person), the competent authority, which was the Commission for the Settlement of Commercial Disputes, examined the challenge of the arbitral award made by both the parties to the dispute alone without the presence of the parties and

¹⁰⁴ AL-SAMMAN, Yahya., *The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia*, 1994, vol. 9, Part. 3, Arab Law Quarterly, p. 234.

¹⁰⁵ HEJAILAN, Salah., *National Reports; Saudi Arabia*, 1979, vol. IV, The Yearbook of Commercial Arbitration, p. 172.

rejected them save for the challenge regarding the amount of the fees of the arbitrators.¹⁰⁶

Moreover, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 fail to determine specific reasons on which the arbitral award may be challenged. The following reasons are normally contained in most arbitration laws of other countries.¹⁰⁷

- Lack of a valid arbitration agreement.
- Constitution of the arbitral tribunal is not in accordance with the arbitration agreement or the mandatory provisions of the arbitration law.
- Lack of impartiality of the arbitrator, abuse of his authority or his exceeding his authority.
- An arbitral award violates mandatory rules of *the Sharī'ah* or public policy.
- Form and contents of the arbitral award not in compliance with the requirements of the arbitration law.
- Lack of due process, such as fair hearing.
- Arbitration proceedings not in accordance with the arbitration agreement or the mandatory provisions of the arbitration law.

It is desirable that the Saudi legislator reviews and modifies the Arbitration Regulation of 1983 and its Implementation Rules of 1985 by providing for some of the above reasons as minimum reasons for challenge of the arbitral award.

According to Article 18 of the Regulation, the request for challenge of the arbitral award should be submitted to the competent authority within fifteen days from the date of the notification of such award to the parties to the dispute.

The question which may arise is the validity of the request for challenge of an arbitral award presented after the expiry of the time limits in the Arbitration Regulation.

¹⁰⁶ The Arbitral Award No. 10/1409, dated 07/03/1411 A.H. (1991 A.D.).

¹⁰⁷ VAN DEN BERG, Albert Jan., *International Handbook on Commercial Arbitration, Saudi Arabia*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984. pp. 27-28; TURCK, Nancy B., *Arbitration in Saudi Arabia*, 1990, vol. 6, no. 3, Arbitration International, p. 290; also ALLAM, Niel F., *Arbitration in the Kingdom: The New Implementation Rules*, August 1985, vol. 8, no. 8, Middle East Executive Reports, pp. 15-16.

The Arbitration Regulation of 1983 is silent with respect to this question. However, the competent authority, such as the Board of Grievances has the power to accept this request or to refuse it. The decision of the competent authority will depend on the nature of circumstances and reasons which causes such delay, whether justifiable, such as *force majeure* or unjustifiable.

On the other hand, the question may arise in respect of the ability of either party to the dispute to object to the decision of the competent authority concerning the request for challenge of an arbitral award, whether it was accepted or refused.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 are silent in respect of the finality of the decision of the competent authority concerning the request for challenge of an arbitral award. In practice, the decision of the competent authority, particularly the Commercial Circuits in the Board of Grievances concerning the request for challenge of an arbitral award is final and not subject to any kind of objection before the Appellate Review Committee (the Court of Appeal in the Board). However, in 1994, losing party in an arbitration took place in Riyadh Chamber of Commerce and Industry had challenged the arbitral award before one of the Commercial Circuits in the Board of Grievances which refused such challenge and issued an order to enforce the arbitral award. This party then objected to the decision of the Commercial Circuit before the Appellate Review Committee in the Board which accepted this objection by a majority vote and decided to reduce the amount of the arbitral award. The Appellate Review Committee in the Board of Grievances only accepted to hear the objection in this exceptional case.¹⁰⁸

The acceptance of the Appellate Review Committee in the Board of Grievances to hear the objection addressed against the decision of the Commercial Circuits concerning the challenge of the arbitral awards is considered a negative step with respect to support for resorting to arbitration as a manner of resolving disputes. In this case, there will be three stages: the arbitral award, the decision of the competent authority which is the Commercial Circuits and the decision of the Appellate Review Committee (the Appeal Court in the Board) before making a final

¹⁰⁸ A member of one of the Commercial Circuits in the Board of Grievances informed me of this position, but he refused to give me details of the concerned case.

and enforceable arbitral award. This approach is time consuming and increases the expenses of arbitration. Therefore, it seems that the submission of the dispute directly to the judicial courts may involve fewer stages.

7.3 Recognition and enforcement of the arbitral award

The arbitral tribunal has nothing to do with respect to the recognition and enforcement of the arbitral award rendered by it because its mission will terminate after making the award.

In general, the losing party has several alternatives in respect of the arbitral award. He may fulfil the award, use the award as a basis for negotiation of a settlement, challenge the award, if this is allowed under the applicable law, or refuse or resist any attempt by the winning party to obtain recognition and enforcement of the award in whatever jurisdiction this is sought.¹⁰⁹

In fact, nearly ninety percent of the arbitral awards are complied with voluntarily by the losing party. This percentage is greater for those awards rendered under the institutional rules of arbitration.¹¹⁰

The losing party usually complies with the arbitral award voluntarily because he wishes to continue the relationship with the winner in future and he wants to protect his reputation, particularly when the arbitration is administered under the auspices of the rules of a trade association of which the loser is a member.

However, when the loser fails or refuses to comply with the arbitral award, the winner must take steps to compel him to do so. The winner may exert some forms of pressure on the loser to enforce the arbitral award. The most effective methods of pressure may be summarised as follows:¹¹¹

a- Cancellation of any continuing commercial relationship with the party who refuses to enforce the arbitral award.

¹⁰⁹ REDFERN, Alan & HUNTER, Martin., supra note (12), p. 417.

¹¹⁰ DOMKE, Martin., *Commercial Arbitration.*, New Jersey, USA, Prentice-Hall, INC. Englewood Clifs, 1965, p. 94.

¹¹¹ For further details, DAVID, René., supra note (1), pp. 357-58.

b- If the arbitration is conducted by one of the rules of trade associations it is possible to make public the non-performance of such party to the members of the trade association.

c- The losing party may not be authorised in future to resort to arbitration administered by the rules of such trade association.

d- It is possible to put his name on a black list of this trade association and his business may then be paralysed.

e- It may be the exclusion of the losing party from the trade association under where auspices the arbitration has been conducted.

Moreover, the winning party may apply to the courts of the connected country for an order that the losing party's assets be seized to satisfy the award of the arbitral tribunal.

This section will be divided into two sub-sections:

- Recognition of the arbitral award.
- Enforcement of the arbitral award.

7.3.1 Recognition of the arbitral award

Recognition of the arbitral award by the competent authority, such as the court means that this award is acquired the status of *res judicata* in respect of all the issue which have been settled by arbitration.

In fact, recognition on its own is a defensive process because it arises when the competent authority is asked to issue a remedy with respect to a dispute which has been decided by arbitration.¹¹²

Either of the parties may ask the competent authority to recognise the arbitral award. The winning party will attempt to prevent the loser from obtaining a new decision from the competent authority in the dispute settled by arbitration by submitting a request for recognition of the arbitral award. He may also use such

¹¹² REDFERN, Alan & HUNTER, Martin., supra note (12), p. 448.

award against a third party as an evidence supporting his claims when the same subject-matter of the dispute arises between him and a third party in future. Moreover, the losing party will ask the competent authority, such as the court to recognise the arbitral award which does not give the winner all his claims.

The arbitral award has a value similar to that of a judgment issued by the competent authority, such as the court when this authority recognises the award.¹¹³

7.3.2 Enforcement of the arbitral award

Enforcement of the arbitral award without delay is an essential element in respect of the resort of businessmen to resolve their disputes to arbitration. This subsection will be divided into the three following parts:

- Enforcement of the national arbitral awards.
- Enforcement of the foreign arbitral awards.
- The position in the Kingdom of Saudi Arabia.

7.3.2.1 Enforcement of the national arbitral awards

The national arbitral award is usually complied with voluntarily by the losing party. However, he may refuse to comply with the arbitral award for reasons affecting the validity of this award or he may refuse the execution of the award without any reason. In this case, the winning party will resort to a state authority, such as the court to confirm the arbitral award and to issue leave to enforce it.

7.3.2.1[i] Competent authority to issue an enforcement order

Neither the arbitral tribunal, nor any arbitral institution, under whose auspices the arbitral award is made, such as the chambers of commerce in the country where

¹¹³ RUBINO-SAMMARTANO, Mauro., *supra* note (61), p. 484.

the enforcement of the national arbitral award is sought, have the power to enforce such award by making an enforcement order of this award. The competent authority, such as the courts at the place where enforcement of the arbitral award is sought has the power to issue a leave to enforce.

Countries usually give the judicial courts the jurisdiction to enforce the arbitral award by issuing an enforcement order on the basis of a request submitted by the winning party. However, these countries differ in respect of which court has the jurisdiction to give leave to enforce of the national arbitral awards.

In many countries, such as France, an enforcement order of the national arbitral award is made by the Court of First Instance. For example, the French Code of Civil Procedure states that:

“ The arbitral award may be forcibly executed only by virtue of an order of *exequatur* by the *Tribunal de Grande Instance* having jurisdiction at the place where the award was rendered.”¹¹⁴

In some other countries, such as Yemen, the winning party brings his request for enforcement of the national arbitral award to the Court of Appeal at the place in which enforcement of the award is sought. The Yemeni Arbitration Act of 1992, for instance, provides that:

“ The Court of Appeal or any authority appointed by the latter has jurisdiction over performance of awards.”¹¹⁵

In England, the High Court has jurisdiction to grant an enforcement order of the national arbitral award. The new English Arbitration Act of 1996 states that:

“ An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.”¹¹⁶

¹¹⁴ The French Code of Civil Procedure of 1980, Art. 1477.

¹¹⁵ The new Yemeni Arbitration Act of 1992, Art. 58.

¹¹⁶ The new English Arbitration Act of 1996, Sec. 66 (1).

Indeed, the competent authority, having jurisdiction to make an order for enforcement of the national arbitral award, has broad powers to issue an *exequatur* or to refuse to do so. It usually makes sure that there is not any reason which may prevent the issue of an enforcement order, and the arbitral award fulfils all the requirements mentioned in the arbitration agreement and in the applicable law.¹¹⁷

7.3.2.1[ii] Procedure for issuing an enforcement order

After the issue of the arbitral award, the winning party submits a request for enforcement of such award to the competent authority, such as the courts. There is not any special form for the request for enforcement of the arbitral award, but there must accompany the request the original of the arbitral award or a certified copy by the arbitrators, the arbitration agreement or a certified copy. In certain countries, such as Egypt a copy of the record of registration of the award.¹¹⁸

In some countries, such as Germany, the losing party should be notified of the request for an enforcement order because he may raise a serious objection to the arbitral award, otherwise, the court will make an enforcement order of the arbitral award.¹¹⁹

In Belgium, the winner should apply for the request for an enforcement by means of an application addressed to the President of the Court of First Instance because the loser can not present his case before the President. However, the President can summon the loser to appear before him if the former needs to obtain additional information about the case.¹²⁰

¹¹⁷ UNGAR, Kenneth T., *The Enforcement of Arbitral Awards under UNCITRAL Model Law on International Commercial Arbitration*, 1987, vol. 25, no. 3, Columbia Journal of Transnational Law, p. 745.

¹¹⁸ EL-AHDAB, Abdul Hamid., *supra* note (18), p. 90.

¹¹⁹ DAVID, René., *supra* note (1), p. 371.

¹²⁰ STORME, Marcel & DEMEULENAERE, Bernadette., *supra* note (62), p. 109.

In Brazil, If the losing party does not comply with the arbitral award the secretary of the arbitral tribunal will submit the award and the file of the case to the judge of the court which will have jurisdiction in the absence of arbitration for the confirmation of the award. This judge will request from the parties their comments on the award within ten days and he will then issue an order of confirmation unless he finds the award null and void.¹²¹

The competent authority to issue an enforcement order of the national arbitral award does not examine all the merits of the award, but it checks that the arbitral award is final and enforceable after the expiry of the time limit for challenging it and such award is not against a final judgment already made by such authority. The enforcement order of the arbitral award is mentioned on the award itself and the clerk of the competent authority will communicate without delay to the parties to the dispute a certified copy of the arbitral award on which the enforcement order is recorded.

7.3.2.1[iii] Reasons for refusing to issue an enforcement order

The competent authority should make sure that the arbitral award is not contrary to public policy and the subject-matter of the dispute can be decided by the arbitration before it issues an enforcement order of the arbitral award.

Moreover, the competent authority may refuse to make an enforcement order if the losing party has presented evidence that there is one or more of the reasons for setting aside of the arbitral award provided by the applicable law. For example, the arbitration agreement is invalid or void.¹²²

Certain countries, such as Egypt determine specific reasons on which the competent authority will not grant an enforcement order of the arbitral award. The new Egyptian Arbitration Act of 1994, for instance, provides that:

“ The application to obtain leave for enforcement of the arbitral award

¹²¹ NATTIER, Frank E., *supra* note (17), p. 416.

¹²² For details about such reasons, see above, pp. 345 *et esq.*

according to the present law shall not be granted except after having ascertained the following:

- a)- That it does not contradict a judgment previously rendered by the Egyptian Courts on the subject matter in dispute.
- b)- That it does not violate the public policy in the Arab Republic of Egypt.
- c)- That it was properly notified to the party against whom it was rendered.”¹²³

7.3.2.1[iv] Time limits for making of an enforcement order

The winning party should apply to the competent authority for an enforcement order of the national arbitral award within a specific period of time after the issue and notification of such award to the parties to the dispute. For example, in United States, the winner can present to a federal court an application for an order confirming the national arbitral award at any time within one year after such award was made.¹²⁴

In many countries, such as Switzerland, an enforcement order of the national arbitral award will not be made before the notification of the losing party and the expiry of the time limit within which such award may be challenged. However, in some other countries, such as France, it is possible to grant an enforcement order of the national arbitral award before the time limit within which such award may be challenged has expired. But, such award will not be executed even if it has been declared enforceable, before the expiry of the time limit for its challenge.¹²⁵

If the request for making of an enforcement order of the arbitral award has been submitted to the competent authority, such as the court, after the expiry of the time limit, this authority will examine the circumstances and reasons, which prevent the submission of such request within the time limit before it issues its decision concerning the acceptance or refusal of such request.

¹²³ The new Egyptian Arbitration Act of 1994, Art. 58 (2).

¹²⁴ The United States Federal Arbitration Act of 1925, Sec. 9.

¹²⁵ DAVID, René., *supra* note (1), pp. 371-72.

7.3.2.1[v] Appeal of the decision of the competent authority

If the competent authority refuses to issue an enforcement order of the arbitral award, it should give the reasons for this refusal. In the absence of such an order, the winning party cannot compel the loser to comply with the arbitral award nor can he seize the loser's assets.

Many countries give the winning party the right to appeal the decision of the competent authority which refuses to issue an enforcement order. However, these countries differ with respect to the possibility to challenge the decision which grants an enforcement order of the arbitral award.

Some countries, such as Belgium give the parties to the dispute the right to appeal the decision of the competent authority relating to the granting or refusal of an enforcement order of the arbitral award. For example, when the Belgian Court of First Instance denies the request for leave to enforce of the arbitral award the winning party can bring an appeal before the Court of Appeal within one month from the notification of the decision of the refusal to the parties. In this case, the decision of the Court of Appeal is final and enforceable. When the Court of First Instance grants an enforcement order of the arbitral award, the losing party can appeal such order before the Court of First Instance itself within one month of receipt of the notification of the enforcement order where a judge other than that who issued the order will decide the appeal.¹²⁶

Some other countries, such as France allow the winning party to appeal the decision of the *Tribunal de Grande Instance* concerning the refusal to grant an enforcement order before the court of appeal at the place where this decision is rendered within one month after the notification of the decision of refusal. However, when the *Tribunal de Grande Instance* grants an enforcement order of the arbitral award the losing party can not appeal this order, but he can challenge the arbitral award itself on the basis of the existence of a reason for setting aside of such award within one month after the notification of the enforcement order.¹²⁷ In this case, the

¹²⁶ The Belgian Judicial Code, Arts. 1711 (1) & 1712 (1).

¹²⁷ The French Code of Civil Procedure of 1980, Arts. 1488 & 1489.

request for challenge of the arbitral award is brought to the court of appeal in the jurisdiction in which this award was made.¹²⁸

In addition, in certain countries, such as Egypt, the decision granting an enforcement order is not subject to any means of appeal. However, the decision refusing to make an enforcement order may be subject to an appeal within thirty days.¹²⁹

7.3.2.2 Enforcement of the foreign arbitral awards

Countries, such as common law countries, which enforcement of foreign arbitral award is sought, usually issue an enforcement order of this award on the basis of the consent of the parties to the dispute to resolve their disputes by arbitration.

A foreign award is generally treated as if it was a domestic award and enforced in the same manner in many countries, such as Belgium.¹³⁰

This sub-section will discuss the aspects and questions concerning the enforcement of a foreign arbitral award and the positions of different countries. It will also set forth the role of the international conventions and rules of arbitration which govern the recognition and enforcement of foreign arbitral awards, particularly the New York Convention of 1958 which is considered the most popular conventions regarding the enforcement of foreign arbitral awards and also the UNCITRAL Model Law of 1985 which is ratified by many countries, such as Scotland.

¹²⁸ ROBERT, Jean & CARBONNEAU, Thomas E., *The French Law of Arbitration*, New York, Matthew Bender & Company Incorporated, 1983, p. I: 5-3.

¹²⁹ The new Egyptian Arbitration Act of 1994, Art. 58 (3).

¹³⁰ DAVID, René., *supra* note (1), p. 393.

7.3.2.2[i] Place of enforcement

Enforcement of a foreign arbitral award is usually sought in the country where the losing party's assets exist. The winner has the opportunity to select the country in which enforcement of the arbitral award is sought when the losing party has assets in more than one country.

In fact, there are certain factors to be taken into consideration when the winning party selects a place of enforcement of a foreign arbitral award. The first is the extent to which the prospective place is linked to the place in which the award was made, whether it retains and applies the New York Convention of 1958 or some other relevant international conventions governing enforcement of foreign arbitral awards. Another factor is the attitude of the local courts to requests for enforcement of foreign arbitral awards. The attitude of the prospective place to the question of state immunity when enforcement of the arbitral award is being sought against a state or a governmental agency is important.¹³¹

The question may arise of the possibility to enforce a foreign arbitral award in various countries when the losing party has assets in these countries.

Indeed, the place where the assets of the losing party exist is more important than the place where the arbitral award is made. There is nothing to prevent a foreign arbitral award being enforced simultaneously in various countries, when the losing party's assets in a country are not enough to cover the amount of the award.

7.3.2.2[ii] Competent authority to issue an enforcement order

Many countries, such as Belgium and France¹³² give the power to issue an enforcement order for a foreign arbitral award to the same court which can issue an enforcement order for a national arbitral award. In these countries, the Court of First Instance of the place where the enforcement of a foreign arbitral award is sought has

¹³¹ REDFERN, Alan & HUNTER, Martin., *supra* note (12), p. 451.

¹³² The French Code of Civil Procedure, Arts. 1477 & 1500.

the power to issue an enforcement order of this award. For example, the Belgian Judicial Code explicitly states that:

“ The President of the Court of First Instance decides, upon request, on the petition for exequatur of arbitral awards rendered abroad in pursuance of an arbitration agreement.”¹³³

In certain other countries, such as Egypt, an enforcement order of a foreign arbitral award is granted by the Court of Appeal, not by the Court of First Instance which has jurisdiction to issue an enforcement order of a national arbitral award.¹³⁴ By contrast, in Yemen, making of enforcement orders of foreign arbitral awards is under the jurisdiction of the Court of First Instance at the place where enforcement of such awards is sought, whereas the Court of Appeal has jurisdiction to issue enforcement orders of national arbitral awards.¹³⁵

In Brazil, the winning party must refer a foreign arbitral award unlike a national arbitral award, to the *Supremo Tribunal Federal* (the Supreme Court) for confirmation before such party can enforce this award.¹³⁶

7.3.2.2[iii] Procedure for issue of an enforcement order

In many countries, such as Belgium, the same procedure, applied when the court issues an enforcement order of a national arbitral award, is applied on the issue of an enforcement order of a foreign arbitral award.¹³⁷

There is not any special form for the request for enforcement of a foreign arbitral award referred by the winning party to the competent authority. However, the winner should enclose with his request for an enforcement order the original award or a duly certified copy thereof, the original arbitration agreement or a duly certified

¹³³ The Belgian Judicial Code, Art. 1719 (1).

¹³⁴ EL-AHDAB, Abdul Hamid., supra note (18), p. 92.

¹³⁵ EL-AHDAB, Abdul Hamid., supra note (57), p. 67.

¹³⁶ NATTIER, Frank E., supra note (17), p. 417.

¹³⁷ See above, p. 380.

copy thereof and if those documents are not in the language of the country where enforcement of a foreign arbitral award is sought, a certified translation by an official or sworn translator or by the consulate of such country in the country where the award was made, should be submitted.

The competent authority to issue the enforcement order will check the fulfilment of the conditions required by the applicable law without examining the merits of the award when this court issues the enforcement order of a foreign arbitral award.

In certain countries, such as Egypt, when the request for enforcement of a foreign arbitral award is brought to the Court of Appeal the other party to the dispute should be notified of this request and the Court of Appeal should hear both parties before it gives a reasoned decision concerning the request.¹³⁸

7.3.2.2[iv] Reasons for refusing to issue an enforcement order

The competent authority, such as the court will make sure before issuing an enforcement order of a foreign arbitral award that this award fulfils all the conditions required by its law and there is not any reason upon which such award may be set aside.

Many countries, such as England and the Netherlands¹³⁹ require that a foreign arbitral award should fulfil some conditions. These countries also determine certain reasons on which the competent authority may refuse to make an enforcement order of a foreign arbitral award.

Under the new English Arbitration Act of 1996, a foreign arbitral award must arise from a valid arbitration agreement, have been made by the arbitral tribunal provided for by the arbitration agreement, and comply with the applicable procedural law. As well, it must become final and binding in the country where it was made, must concern disputes which are arbitrable under the English law, and its

¹³⁸ EL-AHDAB, Abdul Hamid., *supra* note (18), p. 92.

¹³⁹ The Netherlands Arbitration Act of 1986, Art. 1063.

enforcement must not conflict with English public policy. Moreover, a foreign arbitral award will not be executed in England when it has been set aside in the country where it was made, or serious procedural irregularities have emerged which have prevented a party from presenting his case properly before the arbitral tribunal, or if such award does not deal with all the issue submitted or contains decisions on matters beyond the scope of the arbitration agreement.¹⁴⁰

Moreover, under certain national arbitration laws, such as the English law, it is possible for a foreign arbitral award, which contains decisions on matters not settled by arbitration, to be recognised and enforced to the extent that it will contain decisions on matters resolved by arbitration which can be separated on matters not so resolved.¹⁴¹

On the other hand, some countries, such as Spain and many countries of Latin America require the principle of reciprocity as a condition for issuing an enforcement order of the arbitral award made in another country. However, in some other countries, such as Brazil, Italy and the United States, the principle of reciprocity is not required for enforcing foreign arbitral awards.¹⁴²

7.3.2.2[v] Time limits for issuing an enforcement order

The party wishing to enforce a foreign arbitral award should refer its request to issue an enforcement order of such award to the competent authority in the country where enforcement of the award is sought within a specific period. In United States, the request for enforcement of a foreign arbitral award should be submitted to a U. S. court having jurisdiction within three years of the date of the award. In Germany, the time limit, within which the request for an order to enforce a foreign arbitral award must be made, is thirty years from the date of the award.¹⁴³

¹⁴⁰ The new English Arbitration Act of 1996, Sec. 103 (2 & 3).

¹⁴¹ Ibid., Sec. 103 (4).

¹⁴² HOLTZMANN, Howard M., *supra* note (14), p. 31; also DAVID, René., *supra* note (1), p. 389.

If the winning party has submitted his request for issuing an enforcement order of a foreign arbitral award after the expiry of the time limit in the applicable law, acceptance or refusal of such request will be left to the decision of the competent authority. This authority will examine the reasons and circumstances which lead to delay the submission of such request before rendering its decision.

7.3.2.2[vi] Appeal of the decision of the competent authority

The competent authority may accept or refuse to grant an enforcement order of a foreign arbitral award. If it refuses to give an enforcement order of a foreign arbitral award the winning party may attempt to enforce such award in another country in which the losing party has assets or he may appeal the decision of the competent authority concerning the refusal of granting of an enforcement order of the award. A few countries, such as France do not in principle refuse the enforcement of a foreign arbitral award which has been set aside or suspended by a court at the country where it was made.¹⁴⁴

Many countries, such as Belgium and Switzerland allow the winning party to appeal the decision of the competent authority which refuses to grant an enforcement order of a foreign arbitral award. For example, in Belgium, it is possible to appeal the decision of the competent authority relating to enforcement of a foreign arbitral award, whether such authority has granted or refused to issue an enforcement order. The same procedures followed in the case of appeal of the decision of the authority concerning the enforcement of a national arbitral award are applied to the appeal of decision regarding enforcement of a foreign arbitral award.¹⁴⁵

Moreover, in certain countries, such as France, it is possible to bring an appeal before the Court of Appeal within one month after the notification of the

¹⁴³ WESTIN, David., *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany and England*, 1987, vol. 19, no. 2, Law and Policy in International Business, pp. 353-54.

¹⁴⁴ REDFERN, Alan & HUNTER, Martin., *supra* note (12), p. 471.

¹⁴⁵ For details, see above, pp. 383 *et seq.*

decision of the *Tribunal de Grande Instance* which may deny or grant the request for issuing of an enforcement order of a foreign arbitral award.¹⁴⁶

7.3.2.2[vii] The role of the international conventions and rules of arbitration

There are several bilateral and multilateral conventions which may govern the recognition and enforcement of foreign arbitral awards. The most important international conventions concerning the arbitration are the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of foreign arbitral awards of 1927, The New York Convention of 1958, the European Convention on Commercial Arbitration of 1961, the Washington Convention of 1965 on the Settlement of Investment Disputes Between States and Nationals of other States, and the Inter-America Convention on International Commercial Arbitration of Panama of 1975. Many countries have ratified and acceded one or more of these conventions. There are also some international rules of arbitration, such as the UNCITRAL Model Law of 1985 which contain provisions governing recognition and enforcement of the foreign arbitral awards.

The New York Convention of 1958 which is the most popular conventions for recognition and enforcement of foreign arbitral awards will be discussed later on in detail in this chapter.¹⁴⁷ It is convenient to refer briefly to the UNCITRAL Model Law of 1985 because it is adopted by many countries such as Scotland.

¹⁴⁶ DERAINS, Yves., *International Handbook on Commercial Arbitration, France*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1984, pp. 25 & 30.

¹⁴⁷ See below, pp. 403 *et esq.*

7.3.2.2[vii][A] *The UNCITRAL Model Law of 1985*¹⁴⁸

The UNCITRAL Model Law of 1985 applies to international commercial arbitration.¹⁴⁹ It contains certain provisions which deal with enforcement of foreign arbitral awards as follow;

7.3.2.2[vii] [A](i) Formalities

The party to the dispute applying for enforcement of an arbitral award made according to the UNCITRAL Model Law of 1985 must supply to the competent authority, such as the court in the country where the enforcement of this award is sought the following documents:¹⁵⁰

- The duly authenticated original award or a duly certified copy of it.
- The original arbitration agreement or a duly certified thereof.
- A duly certified translation of a foreign language into the official language of the country where the award is enforced if the arbitral award or agreement was made in a foreign language.

7.3.2.2[vii] [A](ii) Refusal of enforcement

The UNCITRAL Model Law of 1985 determines specific reasons on which the competent authority, such as the court may refuse to enforce an arbitral award on its own motion or at the request of the party against whom enforcement of the arbitral award is sought. Article 36 of this Law states the same reasons specified in Article V of the New York Convention of 1958.¹⁵¹

¹⁴⁸ For further details, HOLTZMANN, Howard M. & NEUHAUS, Joseph E., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1989, pp. 1054 *et esq.*

¹⁴⁹ The UNCITRAL Model Law of 1985, Art. 1 (1).

¹⁵⁰ *Ibid.*, Art. 35 (2).

7.3.2.3 The position in the Kingdom of Saudi Arabia

After the issue of the arbitral award, the winning party will attempt to enforce this award immediately where he submits this award to the competent authority for making an enforcement order.

In fact, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 deal with only Saudi arbitral awards. Foreign arbitral awards are usually enforced by the Board of Grievances which has jurisdiction to enforce foreign judgments and arbitral awards.¹⁵²

This sub-section will be divided into two parts. The first part will treat the questions of enforcement of Saudi arbitral awards according to the Arbitration Regulation of 1983 and its Implementation Rules of 1985, whereas the question of enforcement of foreign arbitral awards will be discussed in the second part.

7.3.2.3[i] Enforcement of Saudi arbitral awards

According to Article 20 of the Arbitration Regulation of 1983, the winning party can present a request for enforcement of the arbitral award to the competent authority, such as the Board of Grievances after the issue of such award by the arbitral tribunal. However, the arbitral award becomes final and enforceable when the 15-day period for challenging it has elapsed or when the competent authority has dismissed the request for challenge.

The Arbitration Regulation of 1983 does not require a specific time within which the winner should submit his request for enforcement of the arbitral award to the competent authority. In practice, the winner brings the request for enforcement of the award as soon as he has been notified of such award by the secretary of arbitration.

¹⁵¹ These reasons were mentioned when the New York Convention of 1958 was discussed, for details see above, pp. 406 *et esq.*

¹⁵² The Board of Grievances Regulation of 1982, Art. 8 (1) g.

There is not any special form for the request for enforcement of the arbitral award. As well, it is unclear whether the competent authority will review the merits of the award before making the enforcement order. However, the competent authority will ensure that the arbitral award is not contrary to the mandatory *Sharīah* principles and public policy. The Arbitration Regulation of 1983 confirms that where it states that:

“The award of arbitrators shall be enforceable, when it becomes final, by an order from the Authority originally competent to hear the dispute. This order shall be issued upon request of one of the concerned parties after confirming that there is nothing to prevent its execution in *Sharīah*.”¹⁵³

When the arbitral award contains a decision providing for the payment of interest, the competent authority will delete this decision and enforce the rest of the arbitral award, if it is possible to separate the decision concerning interest. However, when it is impossible to separate the decisions of the arbitral award, the competent authority will not enforce such award and it will consider it as null and void award because it is contrary to the *Sharīah* principles which is the supreme law in the Kingdom of Saudi Arabia.

When the competent authority, such as the Board of Grievances, makes an enforcement order of the arbitral award, it will notify this order to the party in favour of whom the award was made by its clerk. A copy of the award endorsed with a note that an order of enforcement has been granted as follows:

“Any administration and competent government authority is requested to enforce this award by any means in force, if need be, by using force with the contribution of the police.”¹⁵⁴

When the arbitral award is declared enforceable by the competent authority it is considered as having the same status as a judgment made by this authority and it becomes *res judicata*.¹⁵⁵

¹⁵³ The Arbitration Regulation of 1983, Art. 20.

¹⁵⁴ The Implementation Rules of the Arbitration Regulation of 1985, Art. 44.

After granting an enforcement order of the arbitral award, the winning party has two methods by which the arbitral award may be enforced, when the losing party fails or refuses to enforce it voluntarily. The winner may have recourse to the Principality of the province where the loser resides or has assets. The Principality has considerable powers, such as seizing the losing party's property, selling it, and even imprisoning the loser. Alternatively, the winner may submit the enforcement order to the Civil Rights Directorate of the Police at the place of residence of the loser. The Directorate has full powers to enforce the arbitral award. They vary from seizure and sale of the loser's assets to the loser's imprisonment.

The question may arise in respect of the ability of either party to the dispute to challenge the decision of the competent authority concerning enforcement of the arbitral award.

Before 1994, the decision of the competent authority, especially the Commercial Circuits in the Board of Grievances concerning the enforcement of the arbitral award is final and is not subject to any challenge by the loser before the Appellate Review Committee which acts as the Court of Appeal in the Board. However, the view of the Board of Grievances has dramatically changed when the Appellate Review Committee accepted to hear an appeal against the enforcement order of an arbitral award made by one of the Commercial Circuits in the Board.¹⁵⁶

7.3.2.3[ii] Enforcement of foreign arbitral awards

There are two kinds of foreign arbitral awards which may be sought to be enforced in the Kingdom of Saudi Arabia. The first is enforcement of foreign arbitral awards made under one of the foreign arbitration laws or under the rules of one of the international conventions governing arbitration which has not been ratified by the Kingdom of Saudi Arabia yet. The second is enforcement of foreign arbitral awards issued according to the rules of one of the international conventions governing the arbitration which have been ratified by the Kingdom of Saudi Arabia, such as the

¹⁵⁵ The Arbitration Regulation of 1983, Art. 21.

¹⁵⁶ For details, see above, pp. 374 *et esq.*

Arab League Convention of 1952, the Washington Convention of 1965 and the New York Convention of 1958.

7.3.2.3[ii][A] Enforcement without an international convention

In this case, enforcement of a foreign arbitral award should be sought on the basis of municipal rules regarding the enforcement of foreign judgments in the Kingdom of Saudi Arabia.

The party, who wishes to enforce a foreign arbitral award, should refer his request for enforcement to the regional governor where the loser resides or has his place of business, or to the Saudi Foreign Ministry through diplomatic channels. In each case, the request will be transferred via the Office of the Prime Minister to the competent authority to issue an enforcement order of this foreign arbitral award which is the Board of Grievances. This foreign arbitral award must respect the following conditions before leave to enforce is made:¹⁵⁷

- Such award should be confirmed by a judgment from the courts of the country where it was made.
- The judgment should then be duly authenticated by the Saudi Arabian Consulate in the country where this judgment was obtained.
- The judgment should be translated into Arabic by a sworn translator.
- The judgment is not contrary to the mandatory *Sharī'ah* principles and Saudi public policy.

The Board of Grievances will review the merits of the case and the foreign arbitral award will be considered only another piece of evidence in favour of the party seeking enforcement of such award.¹⁵⁸

¹⁵⁷ SALEH, Samir., *supra* note (96), pp. 322-23; also VAN DEN BERG, Albert Jan., *supra* note (107), p. 30.

¹⁵⁸ LEW, Julian D. M., *The Recognition and Enforcement of Arbitral Agreement and Award in the Middle East*, 1985, vol. 1, Arbitration International, p. 175; also LEW, Julian D. M., *Contemporary Problems in International Arbitration; in the recognition and enforcement of foreign arbitral awards in the States of the Arab Middle East written by Samir, SALEH*, Dordrecht, Boston & Lancaster, Martinus Nijhoff Publishers, 1987, pp. 345-46.

In fact, it takes a long time for the Board of Grievances to issue an enforcement order for a foreign arbitral award. Moreover, the Board of Grievances applies the principle of reciprocity in respect of enforcement of foreign arbitral awards.¹⁵⁹

When the Board of Grievances refuses to enforce a foreign arbitral award the party who obtained the foreign arbitral award, may proceed by way of a new trial instituted in the Kingdom of Saudi Arabia before the competent authority which may be *the Sharīah* Courts, legal commissions in the Ministry of Commerce, the Board of Grievances or so on according to the nature of the dispute.

However, when the Board of Grievances issues an enforcement order of the foreign arbitral award the party seeking enforcement of this award will present the order of enforcement to the Principality where the losing party resides, owns assets or carries out his normal activities. The powers of the Principality concerning enforcement are similar to those for national arbitral awards.¹⁶⁰

The decision of the Board of Grievances relating to the issue of an order to enforce the foreign arbitral award is final and is not subject to any objection.

In fact, because enforcement of a foreign arbitral award may involve a new trial and then consume a long period of time, the non-Saudi party usually attempts to enforce the foreign arbitral award in a country other than the Kingdom of Saudi Arabia in which the Saudi party has assets and property. Consequently, the requests for enforcement of foreign arbitral awards are rare in the Kingdom of Saudi Arabia.

7.3.2.3[ii][B] Enforcement according to an international convention

The Kingdom of Saudi Arabia is a party to a number of international conventions dealing with enforcement of foreign arbitral awards as follows:

¹⁵⁹ The Procedural Rules before the Board of Grievances issued by the Council of Ministers' Resolution No. 190, dated 16/11/1409 A.H. (1989 A.D.), Art. 6.

¹⁶⁰ See above, p. 394.

7.3.2.3[ii][B](i) The Arab League Convention of 1952

The Kingdom of Saudi Arabia ratified the Convention on the Enforcement of Foreign Judgments and Awards between the members of the Arab League on the 5th of April 1954.¹⁶¹

7.3.2.3[ii][B](i)(a) *Scope of the Convention*

This Convention governs the enforcement of foreign judgments and arbitral awards issued in the Contracting Countries. The criterion of the place where the arbitral award was made is considered the criterion which the Convention adopts in determining the kind of the arbitral awards, whether domestic or foreign awards.

7.3.2.3[ii][B](i)(b) *Procedure for enforcement of foreign arbitral awards*

The Convention requires each contracting country to determine the competent authority which has jurisdiction to enforce the foreign judgments and arbitral awards. This authority in the Kingdom of Saudi Arabia is the Board of Grievances which applies the same procedure applied to challenge and enforce the Saudi arbitral awards to the foreign arbitral awards issued in one of the Arab Contracting States and referred by the successful party to the Board of Grievances for their enforcement in the Kingdom of Saudi Arabia.

There are some documents which should be accompanied with the request for issuing of an enforcement of a foreign arbitral award according to this Convention. These documents are:

- the original copy of the arbitral award.
- an official certificate which confirms that the arbitral award was notified to the parties to the dispute properly.

¹⁶¹ The parties to this Convention are Egypt, Iraq, Jordan, Kuwait and Libya.

- an official certificate confirming that the parties were notified before the arbitral tribunal properly, if the arbitral award was made in the absence of either party to the dispute.¹⁶²

When a request for enforcement of a foreign arbitral award governed by this Convention is presented to the Board of Grievances, the Board will not review the merits of the award. However, it will make sure that such award fulfils all conditions required by the applicable law.

7.3.2.3[ii][B](i)(c) *Reasons for refusal of enforcement of the award*

The Board of Grievances may refuse to issue an enforcement order of a foreign arbitral award according to this Convention in any of the following cases:

- a)- if the laws of the State where enforcement of the arbitral award is sought do not permit resolution of the subject-matter of the dispute by arbitration.
- b)- if the award has not been made in accordance with a valid arbitration clause or arbitration agreement.
- c)- if the arbitrators have no jurisdiction under the arbitration clause or arbitration agreement, or under the law on the basis of which the award was made.
- d)- if the parties are not properly summoned to appear.
- e)- if the award is contrary to public policy or to the morals in the State where it is to be enforced.
- f)- if the award is not final in the State where it was made.

In practice, no foreign arbitral award has yet been submitted to the Board of Grievances under this Convention. However, there are many foreign judgments issued in one of the Contracting State which were enforced according to this Convention in the Kingdom of Saudi Arabia.¹⁶³

¹⁶² The Arab League Convention of 1952, Art. 5.

¹⁶³ A member of one of the Commercial Circuits in the Board of Grievances said such information to me in a personal interview with him and he refused to give me any judgment was enforced according to this Convention.

On the other hand, there is a subsequent Arab League Convention which is the Convention on Judicial Co-operation between the States of the Arab League. This Convention was approved in Riyadh on the 6th of February 1983 by several Arab League members, including the Kingdom of Saudi Arabia, and came into force in October 1985. It abrogated the Arab League Convention of 1952. However, the Kingdom of Saudi Arabia has not ratified yet the Riyadh Judicial Co-operation of 1983. Therefore, the enforcement of the arbitral awards made in other Arab League States will be based on the Arab League Convention of 1952 in the Kingdom of Saudi Arabia.¹⁶⁴

7.3.2.3[ii][B](ii) The Washington Convention of 1965

The Kingdom of Saudi Arabia became a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 on the 7th of June 1980. The Kingdom of Saudi Arabia expressly excluded investment disputes belonging to oil and acts of sovereignty from the scope of the application of this Convention.

There is no official interpretation of the reservations which have been made by the Kingdom of Saudi Arabia. Legal writers think that the phrase “acts of sovereignty” may be interpreted to relate to these discretionary executive actions which are not subject to judicial review.¹⁶⁵

In respect of the reservation of question “pertaining to oil”, legal writers differ with respect to this matter. Some of them think that questions pertaining to oil would relate solely to crude oil.¹⁶⁶ The others think that the reservation not only concerning questions pertaining crude oil but extends to petrochemical and related industries as well.¹⁶⁷

¹⁶⁴ TURCK, Nancy B., *supra* note (107), p. 290.

¹⁶⁵ LERRICK, A. & MIAN, Q. J., *supra* note (102), p. 181.

¹⁶⁶ FAHMĪ, Aḥmad M., *Article on ICSID Convention*, Dec. 1981, no. 241, *Tidjārat al-Riyāḍ* Magazine published by Riyadh Chamber of Commerce and Industry, pp. 36-7.

¹⁶⁷ LERRICK, A. & MIAN, Q. J., *supra* note (102), pp. 181-82.

In fact, it seems that the reservation concerning questions pertaining to oil only relates to questions pertaining to crude oil because there were not real petrochemicals and related industries in the Kingdom of Saudi Arabia at the time of ratification of this Convention.

The Washington Convention promotes foreign investments for economic development by giving a foreign investor and a Contracting State the right to resolve investments disputes before impartial and international body, and providing them with a set of procedural rules.

The ratification of this Convention is considered a substantial shift in policy for the Kingdom of Saudi Arabia,¹⁶⁸ even though the scope of the Convention is limited where it only applies to foreign parties dealing with the Saudi Government or one of its Agencies, and it only covers investment disputes and excludes contracts for the sale of goods and services.¹⁶⁹

The subscription to the Washington Convention does not impose any obligation on the Saudi Government or its Agencies to submit its disputes with foreign investors to the ICSID arbitration without the mutual consent of the parties.¹⁷⁰

The Washington Convention states arbitration not only between Contracting States and nationals of other Contracting States, but also between Contracting States and legal persons, such as companies which have the nationality of other Contracting States.¹⁷¹ Accordingly, when foreign investors, whether natural or legal persons, conclude investment contracts with the Saudi Government or its Agencies they may insert arbitration clauses to submit their disputes arising out of these contracts to the ICSID arbitration.

¹⁶⁸ MEED Staff., *Saudi Arabia accedes International Arbitration*, 1979, vol. 2, no. 11. Middle East Executive Reports, p. 8.

¹⁶⁹ SALEH, Samir., *supra* note (96), p. 324.

¹⁷⁰ See the Preamble of the Washington Convention of 1965. p. 476.

¹⁷¹ LERRICK, A. & MIAN, Q. J., *supra* note (102), p. 182.

The ratification of the Convention by the Kingdom of Saudi Arabia indicates its acceptance of arbitration as a means of settling investment disputes. Article 42 of the Convention gives the parties to the dispute the right to choose the applicable law to the dispute. Resolution No. 58 does not allow the Saudi Governmental Agencies to choose a foreign law as the applicable law to the dispute.¹⁷²

The question may arise of the ability of Saudi Governmental Agencies to resort to the ICSID arbitration and to select a non-Saudi law as the applicable law to the investment disputes without the need to the authorisation of the Council of Ministers.

Some legal writers think that the Saudi ratification of the Washington Convention abrogates any local rules of Saudi law which prohibit the Saudi Governmental Agencies to have recourse to the ICSID arbitration and to choose a foreign law as the applicable law.¹⁷³

Some other legal writers consider that the approval of the Council of Ministers is a legal prerequisite to the validity of agreements providing for the ICSID arbitration, particularly the Washington Convention of 1965 states that a contracting state's approval of the consent to arbitration by one of its "constituent subdivisions or agencies" is a prerequisite to the validity of such consent to the jurisdiction of the ICSID.¹⁷⁴ Therefore, the legal effect of the provisions of Resolution No. 58 still remains.¹⁷⁵

In fact, it seems that the approval of the Council of Ministers is required when a Saudi Governmental Agency wishes to resort to the ICSID arbitration and when it wishes to choose a foreign law as the applicable law to the disputes in the ICSID arbitration.

More than a decade has passed since the Kingdom of Saudi Arabia ratified the Washington Convention of 1965. Although the Kingdom of Saudi Arabia has

¹⁷² See above, p. 83.

¹⁷³ LERRICK, A. & MIAN, Q. J., *supra* note (102), p. 184.

¹⁷⁴ The Washington Convention of 1965, Art. 25 (3).

¹⁷⁵ LERRICK, A. & MIAN, Q. J., *supra* note (102), pp. 184-85.

been one of the main Middle East Countries which has received many private foreign investments during this period, to date neither the Saudi Government nor its Agencies is known to have entered into any investment contract which includes an ICSID arbitration clause.¹⁷⁶

The arbitral award made according to the Washington Convention is final and binding, and it will be enforced within the territories of each Contracting State as if it was a final judgment of a court in that State.¹⁷⁷

The party who seeks to enforce an ICSID award in the Kingdom of Saudi Arabia should present to the competent authority to issue an enforcement order, which is the Board of Grievances, a copy of this award certified by the Secretary-General of the ICSID and an Arabic translation of the award by a sworn translator. The competent authority will make sure that the award is not contrary to the Saudi public policy derived from *the Sharī'ah* before making an enforcement order of the award.¹⁷⁸

In fact, it is surprise that although the Kingdom of Saudi Arabia has ratified the Washington Convention of 1965 since 1980, there is not any ICSID arbitral award submitted to the Board of Grievances for its enforcement.¹⁷⁹ It is difficult to give a clear answer in respect of this matter because there is no official source which clarifies the reasons for this position.

¹⁷⁶ MOANE, Eduardo., *Saudi Arabia and ICSID*, January 1993, vol. 16, no. 1, Middle East Executive Reports, p. 8.

¹⁷⁷ The Washington Convention of 1965, Art. 54 (1).

¹⁷⁸ A member of the Board of Grievances gave me this information according to a telephone conversation.

¹⁷⁹ This information was given by the same member of the Board of Grievances.

7.3.2.3[ii][B](iii) The New York Convention of 1958¹⁸⁰

In 1994, the Kingdom of Saudi Arabia ratified the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁸¹ This ratification is considered a crucial change in the Saudi attitude concerning the international commercial arbitration, and recognition and enforcement of foreign arbitral awards in the Kingdom of Saudi Arabia.

There are a number of important effects which result from the ratification of the New York Convention. For example, the number of investors and international trade transactions will increase in the Kingdom of Saudi Arabia because foreign private parties are able to resort to arbitration to settle any disputes arising out of their dealing with the Saudi businessmen and the arbitral award regarding these disputes will be enforced in the Kingdom of Saudi Arabia according to the provisions of the New York Convention. Foreign private parties will also be less reluctant to agree upon the Kingdom of Saudi Arabia as a place of arbitration because the arbitral awards made in the Kingdom of Saudi Arabia will be enforced in any contracting state in the New York Convention. Saudi businessmen will also take an interest in participating in arbitration by choosing an arbitrator and appointing a counsel because the arbitral award will be enforced in any contracting state.

7.3.2.3[ii][B](iii)(a) *Scope of application of the Convention*

The New York Convention governs the recognition and enforcement of foreign arbitral awards made in the territory of a contracting State other than the Kingdom of Saudi Arabia where the recognition and enforcement of such award are

¹⁸⁰ For further details, VAN DEN BERG, Albert Jan., *The New York Convention of 1958 towards a Uniform Judicial Interpretation*, Deventer, The Netherlands, Kluwer Law & Taxation Publishers, 1981, pp. 233-382; REDFERN, Alan & HUNTER, Martin., *supra* note (12), pp. 457-65; also BUCHER, Andreas & TSCHANZ, Pierre-Yves., *International Arbitration in Switzerland*, Basle, Switzerland, Helbing & Lichtenha AG, 1988, pp. 163-73.

¹⁸¹ The Royal Decree No. M/11, dated 16/07/1414 AH (1994 AD).

sought. It also applies to arbitral awards not considered as Saudi awards in the Kingdom of Saudi Arabia where the recognition and enforcement are sought.¹⁸²

This definition has three consequences which could have a direct bearing on international commercial arbitration involving the Kingdom of Saudi Arabia:¹⁸³

- The arbitral award issued in arbitration took place outside the Kingdom of Saudi Arabia and relating to a non-domestic dispute will be a foreign arbitral award and it will be recognised and enforced in accordance with the New York Convention.

- The Convention will apply to an arbitral award made outside the Kingdom of Saudi Arabia but relating to a domestic dispute, such as a dispute arising out of a contract between a local subsidiary of a foreign company and a Saudi company which provides for arbitration to be held abroad.

- The Convention will not apply to the arbitral award issued according to the Saudi law and held in the Kingdom of Saudi Arabia in case involving two foreign companies working there because it will be a national award where it will be enforced according to the Saudi Arbitration Regulation of 1983.

7.3.2.3[ii][B](iii)(b) Reservations¹⁸⁴

The Royal Decree No. M/11 declared that the Kingdom of Saudi Arabia will apply the principle of reciprocity in respect of recognition and enforcement of foreign arbitral awards. However, the reservation concerning the nature of dispute, which requires the dispute to be a commercial dispute, was not required by the Decree.

In practice, the reservation of reciprocity does not have a great importance at the present time because most countries in the World have ratified the New York Convention of 1958.

¹⁸² The New York Convention of 1958, Art. I (1).

¹⁸³ BEN ABDERRAHMANE, Dahmane., *Saudi Arabia's Ratification of the New York Convention; What Practical Effects Will It Have?*, March 1995, Middle East Executive Reports, pp. 9, 19.

¹⁸⁴ The New York Convention of 1958, Art. I (3).

7.3.2.3[ii][B](iii)(c) *Formalities and Procedures*

According to Article IV of the Convention, the party seeking to recognise and enforce a Convention award must produce to the Saudi competent authority to enforce foreign arbitral awards, which is the Board of Grievances, the following documents;

- The duly authenticated original award or duly certified copy of it.
- The original arbitration agreement or a duly certified copy of it.
- An Arabic translation of the award and agreement certified by an official or sworn translator, or by a Saudi consular in the country where the arbitration took place if the award or agreement was in a foreign language other than Arabic.

The New York Convention gives the State, where recognition and enforcement of the arbitral award are sought, the freedom to determine the rules of procedure applied to the recognition and enforcement of the award. However, this freedom is limited where the State of enforcement must not impose substantially more onerous requirements or higher fees or charges on the recognition and enforcement of the arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards.¹⁸⁵

The principle of freedom of procedures applied to recognition and enforcement of foreign arbitral awards and the equal treatment of foreign arbitral awards according to Article III of the Convention arises the following question:

Will a new special procedure be adopted for enforcement of foreign arbitral awards before the Board of Grievances or will the present procedure for enforcement of foreign judgment and arbitral awards¹⁸⁶ be applied to the Convention awards?

It may be presumed that nothing will change and the same rules of procedure will be applied, despite the ratification of the New York Convention¹⁸⁷ because there

¹⁸⁵ Ibid., Art. III.

¹⁸⁶ See above, pp. 395 *et esq.*

¹⁸⁷ EL-AHDAB, Abdul Hamid., *Saudi Arabia Accedes to the New York Convention*, Sep. 1994, vol. 11, no. 3, *Journal of International Arbitration*, p. 90.

has not been yet any foreign arbitral award brought to the Board of Grievances for its recognition and enforcement according to the Convention.¹⁸⁸

7.3.2.3[ii][B](iii)(d) *Refusal of enforcement*

Article V of the Convention distinguishes between the grounds for refusal of enforcement that may be involved by the respondent only and those that may also be raised by the Board of Grievances on its own motion.

7.3.2.3[ii][B](iii)(d)(i) Grounds that may be involved by the respondent

The grounds for refusal of enforcement of foreign arbitral awards that may be involved by the respondent are as follows:¹⁸⁹

a)- The recognition and enforcement of foreign arbitral awards may be refused if the respondent proves the incapacity of either party to the arbitration agreement or the invalidity of this agreement either under the law applicable to it or under the law of the country where the award was made.

In practice, the incapacity of either party to the arbitration agreement may be involved by a Saudi Governmental Agency, which can claim that it had not obtained an authorisation from the Council of Ministers to resort to arbitration, or by a party claiming that his representative did not have the specific authority required to enter into an arbitration agreement.¹⁹⁰

b)- The arbitral award will not be enforced if the respondent proves that he was not given proper notice of the appointment of an arbitrator or the arbitration proceedings, or was not given sufficient opportunity to present his case.

c)- The award will not be enforced if the respondent proves that the award concerns a dispute that is not within the terms of the arbitration agreement, whether a

¹⁸⁸ A member of the Board of Grievances gave me this information according to a telephone conversation.

¹⁸⁹ The New York Convention of 1958, Art. V (1).

¹⁹⁰ BEN ABDERRAHMANE., Dahmane, supra note (183), p. 21.

submission agreement or an arbitration clause, or that it contains decision on matters outside the scope of the agreement, unless it is possible to separate those parts of the award that fall within.

d)- The award will not be enforced if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the law of the country where the arbitration was held.

e)- Enforcement of the award may be refused if the award has not yet become binding on the parties, or if it has been set aside or suspended by a competent authority in the country in which, or under the law of which, that award was made.

It is difficult to give specific answers in respect of the application of Article V(1) of the Convention when recognition and enforcement of foreign arbitral awards are sought before the Board of Grievances according to the New York Convention of 1958 because there is no official interpretation for this Article by the Board and there is not any case for enforcement of foreign arbitral award according to the Convention has been submitted to the Board since the Saudi ratification of the Convention in 1994.¹⁹¹

However, a foreign arbitral award is binding and accepted according to the Convention, unless the respondent proves the existence of one of the above grounds mentioned in Article V(1) for the refusal of enforcement. The Board of Grievances will not intervene to check the existence of one of the above grounds or not, unless the respondent alleges its existence.

If the respondent proves the appearance of one or more of the grounds for refusal of enforcement of the award, such as the invalidity of the arbitration agreement the Board of Grievances will refuse to issue an enforcement order of this award.¹⁹²

¹⁹¹ A member of the Board of Grievances told me this information according to a telephone conversation.

¹⁹² Ibid.

7.3.2.3[ii][B](iii)(d)(ii) Grounds that may be invoked by the Board of Grievances itself

Article V(2) of the Convention provides that recognition and enforcement of a foreign arbitral award may be refused, if the competent authority of the country where recognition and enforcement are sought, the Board of Grievances, finds on its own motion that:

a)- the subject-matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement of the arbitral award is sought.

Under Saudi regulations, such as the Arbitration Regulation of 1983, all disputes which can not be resolved by a settlement are not capable of settlement by arbitration.¹⁹³ For example, disputes concerning personal status, succession and crimes cannot be resolved by arbitration.¹⁹⁴

b)- the enforcement of the arbitral award is contrary to public policy of that country.

Public policy reflects the fundamental economic, legal, moral, political, religious and social standards of every society or extranational community.¹⁹⁵ It is thus dependent on the judgment of the particular society, with the result that what is considered a part of the public policy in one society may not be seen as fundamental enough to constitute part of the public policy in another society with different economic, legal, political and religious systems.¹⁹⁶

Saudi public policy is derived from *the Sharī'ah* principles, and usage and practice prevailing in the Saudi Society. The Board of Grievances, in reliance on the public policy exception, may refuse to enforce foreign arbitral awards or such parts

¹⁹³ The Arbitration Regulation of 1983, Art. 2.

¹⁹⁴ For details see above. pp. 112 *et seq.*

¹⁹⁵ LEW, Julian D. M., *Applicable Law in International Commercial Arbitration; A Study in Commercial Arbitration Awards*, New York, Oceana Publication, INC, 1978, p. 532; also BUCHANAN, M., *Public Policy and International Commercial Arbitration*, 1988, vol. 26, American Business Law Journal, p. 529.

¹⁹⁶ CHUKWUMERIJE, Okezie., *Choice of Law in International Commercial Arbitration*, Westport, Connecticut & London, Quorum Books, 1994, p. 44.

thereof as are considered to be contrary to *the Sharī'ah*. There are specific matters which are contrary to Saudi public policy, such as contracts concerning interest, gambling, wine, pig's meat and drugs. Matters, which do not have specific answers in *the Sharī'ah*, such as tobacco and music instruments, will be considered contrary to Saudi public policy or not according to the view of the Board of Grievances.¹⁹⁷ Unless the Board of Grievances construes narrowly what it considers to be a violation of *the Sharī'ah*, the enforcement of foreign arbitral awards could still prove to be problematic.¹⁹⁸

Although the New York Convention does not allow the competent authority, in the country where recognition and enforcement of foreign arbitral awards are sought, to examine the merits of the award¹⁹⁹ the Board of Grievances will review the merits of the award and make sure that the subject-matter of the dispute can be resolved by arbitration and the award does not violate Saudi public policy before making an enforcement order of the award.²⁰⁰

¹⁹⁷ For details about Saudi public policy, see Minimum Standards of *the Sharī'ah*. pp. 17 *et esq.*

¹⁹⁸ CATTAN, E. William., *Saudi Arabia*, Spring 1995, vol. 29, no. 1, International Lawyer, p. 246.

¹⁹⁹ REDFERN, Alan & HUNTER, Martin., *supra* note (12), p. 461.

²⁰⁰ A member of the Board gave me this information according to a telephone conversation.

Summary and Conclusion

This work has discussed the arbitral process from the appearance of the dispute to the making and enforcement of the arbitral award. It has generally examined and clarified the position of national arbitration laws, of international and institutional rules of arbitration, and of international conventions governing arbitration as a means of resolving disputes.

This thesis has analysed and discussed the position of the Kingdom of Saudi Arabia concerning arbitration, with special reference to the provisions of the Arbitration Regulation of 1983 and its Implementation Rules of 1985. It makes some recommendations to deal with defects in the Regulation and Rules.

The main sources of the Saudi legal system are four:

- *The Shari'ah* which is derived from *the Qur'an*, *the Sunnah* (traditions of the Prophet *Muhammad*), *the Idjma'* (consensus), *the Qiyas* (analogy) and certain supplementary sources, such as *Istihsan* (juristic preference).
- State regulations and resolutions issued by royal decrees such as the Labour and Workmen Regulation of 1969 and the Provincial Government Regulation of 1992.
- Bilateral and multilateral treaties ratified by the Kingdom of Saudi Arabia.
- Custom and practice prevailing in the Kingdom of Saudi Arabia, especially modern practice concerning commerce and international trade.

The Shari'ah, with special reference to *the Hanbali* school of the Islamic jurisprudence, is the supreme law in the Kingdom of Saudi Arabia. *The Shari'ah* does not contain detailed provisions providing specific solutions to all legal problems arising in society, but it contains general principles from which the solutions to these problems can be derived. To provide such solutions, the issue of regulations (laws) and resolutions for the good administration of the country and for the fulfilling of the changing society's needs and new circumstances is required and necessary, particularly from the King (*Imam*), who has the religious and secular leadership of the country according to *the Shari'ah*.

The necessary regulations are usually issued by the King after they have been

prepared and recognised by the Council of Ministers and the Consultative Council. These regulations apply and supplement the general principles of *the Shari'ah* and do not conflict with them.

The Saudi judicial system is divided into three major institutions of judiciary:

- *The Shari'ah* Courts, which are divided into the following hierarchical system: the Higher Judicial Council, the Courts of Appeal, the General Courts and the Summary Courts,

- The Board of Grievances (the Administrative Court) which is an independent judicial commission with ties to no governmental authority other than the King. It consists of administrative, commercial, disciplinary and secondary circuits.

- The specialised judicial organs such as the Commercial Papers Committee, the Committee for the Settlement of Banking Disputes, and the Committees for the Settlement of Labour Disputes, where each committee has limited jurisdiction to decide specific disputes according to the provisions of the regulation governing it.

It is recommended that the Council of Ministers Resolution No. 167 issued in 1981 should be applied where it states the establishment of specialised courts for the adjudication of commercial, labour and traffic disputes because practical reality requires that. In particular, the existence of commercial circuits in the Board of Grievances does not fit the nature of the Board as an administrative court deciding disputes in which one of the parties is the Government or one of its Agencies. The existence of more than thirty specialised judicial organs also causes many complicated problems such as the determination of the competent authority to decide disputes arising between the parties, the increase of expenses and the number of judges. The application of this Resolution will help to resolve these problems.

The Shari'ah recognises the concept of arbitration as a method of settling disputes. Moreover, arbitration was the primary and favourable method of resolving disputes between the Saudi Government or one of its Agencies and foreign private parties. The Saudi Government used to include arbitration clauses in concession contracts concluded with foreign companies for the excavation of oil and other natural resources, such as the concession contract between the Saudi Government and

the Arabian American Oil Company (Aramco).

However, the attitude of the Saudi Government towards arbitration changed to one of hostility after the arbitral award in the Aramco Case was made against the Kingdom of Saudi Arabia. The Saudi Government then issued its Resolution No. 58 of 1963 which prohibited the submission to arbitration of disputes arising between the Saudi Government or one of its Agencies on the one hand, and physical persons, companies, or private organisations on the other, with certain exceptions concerning concession contracts which contain interests of utmost importance for the Kingdom of Saudi Arabia, and technical disputes.

More recently, the Saudi Government has sought to reduce the scope of the prohibition by ratifying some bilateral and multilateral conventions governing arbitration as a means of settling disputes such as the ratification of the Washington Convention of 1965 and the New York Convention of 1958. In addition, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 permit governmental agencies to settle their disputes with private parties by arbitration provided that authorisation is obtained from the President of the Council of Ministers.

In respect of domestic arbitration, arbitration was not governed by special regulation before the issue of the Arbitration Regulation of 1983. However, there were some provisions concerning arbitration included in certain regulations, such as Articles 493-497 of the Commercial Court Regulation of 1931, Articles 183, 184 and 187 of the Labour and Workmen Regulation of 1969, Article 5(h) of the Chambers of Commerce and Industry Regulation of 1980 and Articles 49-54 of its Implementation Rules of 1981.

The issue of the Arbitration Regulation of 1983 and its Implementation Rules of 1985 has made arbitration an acceptable means for the settlement of disputes arising between businessmen because they contain many provisions, which deal with many aspects of the arbitral process.

However, the Regulation and its Rules contain several provisions which impose some restrictions on the parties' freedom and which give the competent authority strong control over the arbitral process, such as the necessity of the

approval of arbitration agreements by the competent authority before the commencement of the arbitration proceedings. It is important that the Saudi legislator removes these restrictions by giving the parties to disputes sufficient freedom to deal with the main aspects of arbitration because this freedom will encourage businessmen, whether Saudis or foreigners to have recourse to arbitration in the Kingdom of Saudi Arabia.

The Arbitration Regulation of 1983 gave rise to much debate about the ability of the Chambers of Commerce and Industry to administer arbitration according to the arbitration provisions existing in their Regulation of 1980 and its Implementation Rules of 1981, because the Arbitration Regulation of 1983 does not give a clear answer with respect to this matter. Although there is a provision in the Arbitration Regulation which gives the parties to the dispute the right to adopt a “special clause” in the arbitration agreement to deal with any problem arising during the arbitral process, such as the death or resignation of one or more of arbitrators, this done by a particular institution, such as the Chambers of Commerce and Industry, it is important that the Saudi legislator expressly gives the Chambers of Commerce and Industry the power to apply the arbitration provisions existing in their Regulation of 1980 and its Implementation Rules of 1981, since arbitration is conducted under the auspices of these Chambers.

There are two major types of arbitration agreement. The first is a submission agreement to refer specific existing disputes to arbitration. The second is an arbitration clause to submit future disputes to arbitration. The arbitration Regulation of 1983 explicitly recognises the different types of arbitration agreement. Recognition of an arbitration clause is considered one of the main changes adopted by the Arbitration Regulation, since the concept of an arbitration clause before this Regulation was unknown in Saudi legal regulations and the judicial authorities. The courts, for instance, were not bound to submit the case to arbitration when there was an arbitration clause. However, it is recommended that the Saudi legislator reviews the Regulation and inserts a provision, which confirms the separability of an arbitration clause from the main contract.

The Arbitration Regulation requires the parties to the dispute to prepare an

arbitration instrument, whether arbitration is based on an arbitration clause or on a submission agreement, and to have this instrument approved by a competent authority, such as the Board of Grievances, before the commencement of the arbitration proceedings. If either party to the dispute (almost always the respondent) refuses to co-operate with the other party to prepare such an instrument, the competent authority will intervene at the request of the other party and request the refusing party to respect the arbitration agreement and to participate in the preparing of an arbitration instrument. However, this requirement may lead to an increase in the intervention of the courts and to delay in the commencement of the proceedings.

It is important that the Saudi legislator revises the terminology of the Arbitration Regulation of 1983 and its Implementation Rules of 1985 because there is inconsistency in their terminology. It is recommended to use the general term “arbitration agreement” throughout the Regulation and Rules, and the specific terms “arbitration clause” and “submission agreement” where a different treatment of these two categories is desired.

There are some provisions as to the validity of the arbitration agreement, such as agreement in writing, capacity of the parties to the dispute and arbitrability. As with most national arbitration laws, and international and institutional rules of arbitration, the Arbitration Regulation of 1983 requires certain conditions. It requires implicitly that an arbitration agreement should be in writing because any arbitration instrument must contain the names and signatures of the parties and arbitrators, the subject-matter of the dispute and so on. It is recommended that the Saudi legislator recognises the validity of an arbitration agreement concluded by one of the modern means of communication, such as fax or orally, particularly as the importance of these methods is increasing rapidly in the commercial sphere.

The Arbitration Regulation expressly requires the parties to have full legal capacity to refer disputes to arbitration. Moreover, although this Regulation has reduced the scope of the prohibition of the Saudi Government or one of its Agencies to settle disputes by arbitration, it is recommended that the Saudi legislator abrogates this prohibition in general or at least in domestic arbitration, especially as there are many Governmental Agencies which participate in economic and commercial

activities by having percentages of the capital in companies.

The Regulation explicitly states that all disputes on any matter of law may be resolved by arbitration, except matters which can not be so resolved by a settlement, such as crimes or any matter relating to public policy. Consequently, arbitration is not allowed in respect of disputes arising out of the contracts which deal with usury (interests) or gambling because these contracts are contrary to *the Shari'ah* and to Saudi public policy.

The main effect of the Arbitration Regulation is that a dispute brought to the court must be submitted to arbitration where there is an arbitration agreement. This step constitutes a significant improvement on the former situation where the arbitration agreement, though valid, was unenforceable. However, the Regulation is silent in respect of the time by which either party to the dispute should invoke the arbitration agreement before the court. It would be helpful if the Saudi legislator stipulated the production of an arbitration agreement before taking any step in the court proceedings. Otherwise, the party loses the right to stay these proceedings on the existence of an arbitration agreement if he has participated in them.

The requirement of an uneven number of arbitrators by the Arbitration Regulation helps to remove deadlocks, which may arise in the case of a difference of opinion between the members of the arbitral tribunal composed of an even number because the arbitral award is made by majority vote.

According to the Arbitration Regulation, the parties have full freedom to appoint arbitrators themselves, or by a third party chosen by them, or by co-operation between them and a third party. The competent authority will appoint arbitrators if the parties are unable to agree upon them or if either party does not nominate his arbitrator. It is recommended that the Saudi legislator determines a specific period within which the members of the arbitral tribunal should be appointed by both parties, or the competent authority will assume this task. This period will assist to eliminate any attempt by the defaulting party to delay the commencement of the arbitration proceedings.

There are some major qualifications which are required by most arbitration laws for a person who wishes to act as an arbitrator, such as full legal capacity,

sufficient experience, impartiality and independence. The Arbitration Regulation expressly requires only that an arbitrator must have full legal capacity. So, it is important that the Saudi legislator explicitly requires sufficient experience, impartiality and independence in a person who acts as an arbitrator.

These stipulations raise some questions which need clear answers from the Saudi legislator. For example, the stipulation of full legal capacity raises the question of the ability of women to act as arbitrators in the Kingdom of Saudi Arabia. *The Shari'ah* recognises that women do not have full competence to give evidence where the testimony of two women is equivalent to that of one man. Majority of *the Shari'ah* scholars adopt the view that women are unable to act as judges or arbitrators. Further, the competent authority, such as the Board of Grievances may refuse to enforce an arbitral award made by a woman-arbitrator or by an arbitral tribunal composed of a woman-arbitrator. So, it is recommended that the Saudi legislator give a clear answer in respect of this matter.

The question also arises in regard to the ability of non-Muslims to act as arbitrators. Non-Muslims are unable to act as arbitrators only in domestic arbitration because the applicable law on the dispute is normally *the Shari'ah* which is the supreme law in the Kingdom of Saudi Arabia. However, in international commercial arbitration held in the Kingdom of Saudi Arabia, it is not necessary that the members of the arbitral tribunal are Muslims, particularly when a foreign law is the applicable law on the dispute. The Saudi legislator should explicitly set forth his opinion with respect to the ability of non-Muslims to act as arbitrators.

The Arbitration Regulation requires that at least one of the arbitrators should have a sufficient knowledge of *the Shari'ah* rules, of commercial regulations, and of the customs and traditions applicable in the Kingdom of Saudi Arabia. However, it does not determine the scope of this knowledge and whether or not it is necessary that at least one arbitrator should have a certificate in *the Shari'ah* or law. It is recommended that the Saudi legislator requires that at least one of the arbitrators should be a *Shari'ah* scholar or a lawyer because this requirement will help to deal with any legal problem arising during the arbitral process.

There are many powers which are conferred upon the arbitral tribunal to

administer the arbitral process by the parties to the dispute in the arbitration agreement and by the applicable law of arbitration. The Arbitration Regulation expressly gives several powers to the arbitral tribunal for conducting the arbitration effectively, such as the power to extend the time limit for making the award and the power to appoint one or more experts, if necessary, to provide a special report concerning matters of the case.

Moreover, there are many duties which are imposed upon the arbitral tribunal by the parties to the dispute and by the applicable law. The Arbitration Regulation imposes certain duties such as the duty of the arbitral tribunal to treat each party equally and to give them a full opportunity to present their case. However, the Regulation is silent with respect to the immunity or liability of arbitrators. Therefore, it would be helpful if the Saudi legislator confirmed the liability of an arbitrator to either party to the dispute for loss caused by his intentional wrongful behaviour or if he makes a serious lapse in bad faith, like by accepting a bribe.

According to the Arbitration Regulation, an arbitrator may be dismissed by the mutual consent of the parties to the dispute and also either party has the right to challenge an arbitrator within five days from the day on which a reason for challenge has occurred and at any stage of the arbitration proceedings, unless the arbitral award has been made. It would be better that the Saudi legislator increased this short period in order to give the parties a sufficient opportunity to prepare and bring the request for the challenge of an arbitrator to the competent authority.

Arbitrators in general have the right to claim from the parties to the dispute the fees for their work and for time spent on the case. The fees and expenses are fixed by the parties after consultation with the arbitrators themselves. If they are unable to agree upon a specific amount the competent authority will fix it.

Under the Arbitration Regulation, the decision of the competent authority concerning the fees of arbitrators is final. However, its Implementation Rules contain a provision which gives either party to the dispute the right to object to the decision of the competent authority relating to the fees of arbitrators within eight days from the date of notification of this decision. The objection is brought to the competent authority itself. In fact, it is necessary that the Saudi legislator reviews these

provisions and gives a clear opinion in respect to the finality of the decision of the competent authority concerning the fees and expenses of arbitrators.

In general, the arbitration proceedings commence when the request for arbitration is received by the respondent or by the secretariat of the arbitral institution, or when the last arbitrator accepts his mission in the arbitral process. The Arbitration Regulation states that the arbitration proceedings will commence when the arbitral tribunal fixes the date of the first session to hear the dispute, this within no later than five days of the date on which it receives the decision of the competent authority concerning the approval of the request for arbitration, whether arbitration stems from a submission agreement or from an arbitration clause.

The party may be notified by the other party or by sending a registered letter to their address to make sure that he has received the notice. The Implementation Rules of 1985 contain several provisions which clarify in detail all the matters regarding the notification of the parties to the dispute. It can be concluded from these procedures that the Saudi legislator is attempting to eliminate any difficulties which may prevent the commencement of the arbitration proceedings. However, these procedures may themselves lead to a delay in the commencement of the proceedings.

In principle, the applicable law on the arbitration proceedings in domestic arbitration is the law of the country where the arbitration takes place. However, in international commercial arbitration, the parties have full freedom to agree upon the applicable law on the proceedings. If they are unable to agree upon specific procedures the arbitral tribunal will assume this task.

The Arbitration Regulation and its Implementation Rules are applied to the arbitration proceedings and supplemented by the rules of other Saudi regulations in accordance with the nature of the dispute submitted to arbitration, whether civil, commercial, labour disputes, otherwise in domestic arbitration. However, it is acceptable that the parties have the right to choose a foreign law as the law governing the arbitration proceedings in international commercial arbitration held inside the Kingdom of Saudi Arabia.

In domestic arbitration, arbitration usually takes place in the country where the arbitral process is conducted according to its law. In this case, the parties can

choose one of its cities as the place of arbitration. In international commercial arbitration, the parties are free to determine the place of arbitration. But, if they are unable to agree upon the place, the arbitral tribunal itself or the competent authority will assume this role. There are some factors to be taken into account when the place of arbitration is determined, such as the nationality of the parties, expenses of arbitration, economic, political, legal and practical factors.

It is recommended that the Saudi legislator expressly requires that arbitration should be held in the Kingdom of Saudi Arabia in domestic arbitration but giving the parties the freedom to choose any Saudi city, such as Riyadh and Jeddah as the place of arbitration.

The parties may appear personally or through representatives before the arbitral tribunal during the proceedings according to the Implementation Rules of 1985. However, the Arbitration Regulation and these Rules are silent in respect to the ability of foreigners to act as representatives of the parties before the arbitral tribunal. In practice, the parties may be represented by foreigners who should be Muslims and talk Arabic. It is recommended that the Saudi legislator explicitly confirms this matter. The Regulation does not impose any particular conditions with respect to the nature of representatives who may or may not be lawyers.

The Arbitration Regulation and its Implementation Rules give the arbitral tribunal the power to try to make a settlement between the parties during the arbitral process. However, if a settlement is impossible the arbitration will continue until the issue of the arbitral award by the tribunal. The provision of the Implementation Rules is unclear in respect to the role of the arbitral tribunal during the settlement between the parties where it states that the arbitral tribunal only records the settlement without participating with the parties in preparing such a settlement. In fact, the Saudi legislator should modify this provision because the tribunal in practice performs an important task in the process of settlement between the parties.

The arbitral tribunal gives great importance to the written statements containing written pleadings, statements of evidence and documents regarding the dispute before making the award because these statements clarify aspects of the subject-matter of the dispute.

Evidence may be taken by several methods, and the most important methods for presenting evidence are the production of documents, the testimony of witnesses, the opinions of experts and the inspection of the site of the dispute. The arbitral tribunal often has the power to require either party to produce any relevant document in his possession, to ask any witness to attend hearings and to give his testimony, to appoint experts, and to inspect the site of the dispute when needed.

However, if either party or any witness does not comply with the order of the tribunal, the competent authority will intervene and assist the arbitral tribunal by compelling the refusing person to respect the order of the tribunal. Moreover, the arbitral tribunal may need the assistance of the competent authority to subpoena a third party to appear before it and to give the testimony, or to produce any relevant documents in his possession. The Arbitration Regulation and its Implementation Rules explicitly confer upon the arbitral tribunal the power to require either party to produce any relevant document, to ask any witness to give the testimony, to appoint experts and to inspect the site of the dispute if it is necessary.

According to the Implementation Rules, the arbitral tribunal has the power, at the request of either party or on its own motion, to hold oral hearings and to put questions to the parties and witnesses with respect to some aspects of the dispute.

The competent authority exercises important functions at the various stages of the arbitral process. These functions may be clarified as belonging to three categories, as follows:

- The competent authority may issue interim measures of protection for preserving the subject-matter of the dispute from abuse by either party, such as the issue of an interim order to one of the parties to put perishable goods in a freezer for their protection or to sell them. The competent authority may also compel either party to enforce interim measures of protection made by the arbitral tribunal, and this authority may also make interim measures of protection for a third party, such as the issue of an interim order to the bank to freeze sums held in the bank account of one of the parties.

- The competent authority may support the arbitral process, such as the appointment of any arbitrator, if the parties are unable to agree upon him or if the

party fails to appoint his arbitrator. Moreover, it may assist the arbitral tribunal by making an order to a third party to attend the hearing and to produce any relevant document in his possession. It can also compel any party to comply with the order of the tribunal concerning the production of documents.

- The supervisory function of the competent authority may be required when emergency problems arise during the arbitration proceedings, such as when one arbitrator has been bribed by one of the parties to the dispute.

The Arbitration Regulation and its Implementation Rules contain several provisions which confer upon the competent authority the powers to assist the arbitral tribunal to administer the proceedings effectively. The competent authority has some of these powers as have already been mentioned above, for example, the competent authority intervenes to appoint the presiding arbitrator if the parties are unable to agree upon him or an arbitrator of the defaulting party. Further, the arbitral tribunal may request the assistance of the competent authority in the course of the arbitration proceedings, such as when either party refuses to produce relevant documents in his possession, or when a witness refuses to appear before the tribunal at the hearing. The competent authority can issue interim measures of protection to a third party to produce any documents concerning the case in his possession.

In addition, the competent authority files the arbitral award and decides any objection concerning it. It will then issue an enforcement order of the award if it refuses the objection, or it will decide the case by itself if it accepts the objection.

Under the Implementation Rules, the issue of the arbitral award requires to hold deliberations which must take place in secret and only members of the arbitral tribunal participate in them. However, the Arbitration Regulation and its Implementation Rules are silent when one of the arbitrators refuses to participate in deliberations. It would be helpful if the Saudi legislator treated this question by giving the other arbitrators the power to proceed in holding deliberations and to render the arbitral award after making sure of the reasons for the absence of this arbitrator.

In general, three-member arbitral tribunals may make the award unanimously, or by a majority vote, or sometimes by the presiding arbitrator alone when he is

conferred this power by the agreement of the parties or by the applicable law of arbitration.

The Arbitration Regulation explicitly states that the arbitral award should be made unanimously or by the majority vote whilst clarifying the reasons for the refusing arbitrator. It is recommended that the Saudi legislator deals with the question which may arise when there is not a majority vote by giving the presiding arbitrator the power to issue the award or by giving the competent authority the power to decide the case.

The parties generally have the right to fix a specific time limit within which the arbitral award should be made or the statutory time limit specified by the applicable law will be considered the time limit of arbitration. This time limit may be extended by the mutual consent of the parties or by the arbitral tribunal itself or by the competent authority at the request of the parties or the arbitral tribunal. The Arbitration Regulation gives the parties the right to fix a time limit within which the award should be made. However, if they do not specify a time limit the Regulation decides that the time limit of arbitration will be ninety days from the date on which the arbitration agreement is filed by the competent authority. In addition, the Regulation gives the parties and the arbitral tribunal the right to extend the time limit of arbitration, if it is necessary to do so.

The time limit for making the arbitral award raises certain questions, such as should the request for an extension of the time limit be presented before the expiry of the original time limit, because the parties and the arbitral tribunal will lose the right to extend the time after that point and the arbitration proceedings will end if the time limit is not extended. Moreover, this matter raises question relating to the validity of an arbitral award made after the expiry of the time limit of arbitration, and opens the question regarding the expiry of the time limit of arbitration before the making of an arbitral award. The Arbitration Regulation does not deal with these questions and it is important that the Saudi legislator reviews it and sets forth his position on these questions. It is recommended that he expressly give the competent authority the power to deal with any of these questions when they arise.

In general, there are various types of awards which may be made during the

arbitral process, such as interim, partial, final and additional awards. The issue of an interim award may be required to decide one or more issues of the dispute in the preliminary stages of the arbitral process, such as the question of the jurisdiction of the arbitral tribunal to decide certain issues of the dispute. As well, a partial final award may sometimes be required to dispose one or more substantive issues of the dispute, such as a sum of money which is indisputably due and payable by one party to the other. A final award must be rendered by the arbitral tribunal to decide all issues submitted to it by the parties. Sometimes, one or more issues of the dispute is omitted from the final award made by the tribunal, such as the costs of arbitration. In this case, the need to make an additional award appears so as to decide these omitted issues.

The Arbitration Regulation of 1983 does not give the arbitral tribunal clear powers to issue interim, partial and additional awards. So, it is recommended that the Saudi legislator explicitly grant the arbitral tribunal the power to make interim, partial and additional awards during the arbitral process, because this power will enable the tribunal to conduct the arbitration proceedings effectively.

The Arbitration Regulation and its Implementation Rules require some formalities in the form of the arbitral award, such as the date and place where it is made, the reasons for the award, the names and signatures of arbitrators. In fact, the aim of the Saudi legislator with these formalities is to speed up enforcement of the award because these formalities will help the competent authority to make sure that the arbitral tribunal has respected the general principles of equity and the provisions of the applicable law before making an enforcement order of the award.

The question of the validity of the arbitral award may arise when the tribunal does not respect one or more of these formalities, such as when the award does not include the reasons on which it is based. In practice, the competent authority has two alternatives. It may remit the award to the arbitral tribunal to fulfil all requirements imposed by the Regulation or it may set aside the award and decide the case by itself. It is recommended that the Saudi legislator confirms the practical reality by giving the competent authority the power to consider each case and then to remit or set aside the arbitral tribunal.

The arbitral award is usually signed by the members of the arbitral tribunal. However, if an arbitrator refuses to sign the award because he disagrees with the other arbitrators the award will be valid if it is signed by the majority of arbitrators, and contain the fact of the missing signature and specify the reasons its absence. It is possible to allow the dissenting opinions to be mentioned in the original copy of the award or to be annexed to the award in a separate document if the arbitrator agrees to sign the award.

The Arbitration Regulation has dealt with the problem arising out of the refusal of an arbitrator to sign the award where it requires that this be set forth that in the arbitral award and that the remaining arbitrators sign the award. However, it is silent in respect to the possibility of written dissenting opinions. In fact, it is recommended that the Saudi legislator codifies the practical reality concerning the question of dissenting opinions where the refusing arbitrator usually signs the award, and writes his dissenting opinions in a separate document and attaches it to the original copy of the award.

Many countries require registration of the arbitral award with the competent authority, such as the court, and determine a specific time limit within which the award should be registered. The Arbitration Regulation explicitly requires registration of the arbitral award within five days of its being made with the competent authority such as the Board of Grievances. However, it does not deal with the position when the request for registration of the award is referred to the competent authority after the five days time limit. It is recommended that the Saudi legislator give the competent authority the power to consider the reasons for delay and decide whether or not these reasons are justifiable. In fact, the submission of the request for registration of the arbitral award after the expiry of the statutory time limit may not lead to the setting aside of that award since this infringement does not have dangerous consequences. Moreover, it is recommended that the Saudi legislator determines a specific period within which the competent authority should register the arbitral award.

The arbitral tribunal often has jurisdiction to correct any minor clerical or typographical errors in the award at the request of either party to the dispute or on its

own motion. Further, the tribunal may interpret any ambiguity of language of the award at the request of the parties when the arbitration agreement or the applicable law of the arbitral process gives it this power. The Implementation Rules of 1985 contain provisions which explicitly grant the arbitral tribunal the power to correct any clerical or typographical or mathematical errors in the award and to interpret any ambiguity in the original text of the award. However, it is recommended that the Saudi legislator fixes a time limit within which the request for correction or interpretation of the arbitral award should be submitted to the arbitral tribunal.

An arbitral award is considered by many countries as a national award when it is made within the territory of the country according to its national law and at least one of the parties has its nationality or he is a resident in it. An arbitral award is often considered as a foreign award when it is made in a country other than the country in which recognition and enforcement of this award are sought, or when arbitration is conducted according to a foreign law or one of the international and institutional rules of arbitration, such as the LCIA Arbitration Rules, or when the parties are foreigners or non-residents in the country where the arbitration takes place.

In principle, either party to the dispute has the right to challenge the arbitral award, whether national or foreign, before a competent authority such as the court. However, many countries give the parties the power to waive the right to challenge the arbitral award by inserting a provision in the arbitration agreement.

There are many grounds upon which either party may challenge the award, such as the non-existence of an arbitration agreement, or if it is null and void, or expired, or the incapacity of either party according to the applicable law of arbitration.

The request for the challenge of an arbitral award should be submitted to the competent authority within the statutory time limit. However, if it is referred after the expiry of the time limit the parties lose the right to challenge, and the competent authority would have limited powers to consider the reasons and circumstances leading to delay.

When the request for the challenge of the award is referred to the competent authority its enforcement will be suspended until the decision of the authority. If the

request for challenge is refused the award will be immediately confirmed and become *res judicata*, and the competent authority will issue its enforcement order. However, if the request for challenge is accepted, the arbitral award will lose its legal validity and effects, and the parties to the dispute have choices. They may remit the case to the same arbitral tribunal, or they may submit it to a new arbitral tribunal for deciding it anew, or they may refer it to the same competent authority for its decision.

An arbitral award is considered as a Saudi award when it is made in the Kingdom of Saudi Arabia and according to the Saudi procedural and substantive laws. According to the Arbitration Regulation of 1983, either party to the dispute has the right to challenge the arbitral award before the competent authority such as the Board of Grievances. However, it is unclear whether the competent authority is authorised to examine all the merits of the dispute before its decision on the request for challenge or on the reasons for the challenge.

It is recommended that the Saudi legislator require the competent authority to examine only the reasons for challenge of the award without reviewing the merits of the dispute, because review of all the merits of the dispute will consume much time and increase the expenses of arbitration.

The Arbitration Regulation does not determine specific reasons upon which the arbitral award may be challenged. So, it would be helpful if the Saudi legislator reviewed the Regulation and provided for some grounds for challenge of the arbitral award.

The Regulation specifies a time limit within which the request for challenge of the award should be submitted to the competent authority. However, it is silent in respect to the submission of the request for challenge after the expiry of the statutory time limit. In practice, the competent authority has the power to accept or refuse the request for challenge according to the circumstances and reasons for the delay. But it is important that the Saudi legislator clarifies his opinion with respect to this question.

In addition, the question of the possibility of objecting to the decision of the competent authority concerning the request for challenge of the arbitral award may arise.

Before 1994, the prevailing belief was that the decision of the competent authority is final and enforceable. In 1994, however, the losing party in one case settled by arbitration objected to the decision of one of the Commercial Circuits (like the First Instance Court) regarding the request for challenge of the arbitral award submitted by it. This objection was accepted by the Appellate Review Committee (the Appeal Court in the Board of Grievances) by majority vote and it decided to reduce the amount of the arbitral award.

In fact, the recent position is a negative step with respect to attracting businessmen to settle their disputes by arbitration, because this position is time consuming and increases expenses. So, it is recommended that the Saudi legislator intervenes and confirms the finality of the decision of the First Instance Court concerning the objection of the arbitral award.

The arbitral award, whether national or foreign, is usually obeyed voluntarily by the loser. However, if he refuses the winning party may resort to a state authority such as the court to recognise the award and to issue leave to enforce it.

The request for enforcement of the arbitral award must be accompanied by the original copy of the arbitral award (or a certified copy) and the arbitration agreement (or a certified copy). The competent authority will check that the arbitral award fulfils basic principles, such as the principle of equity between the parties during the arbitral process, and that it respects the conditions required by the applicable law without examining the merits of the case.

The competent authority may also refuse to issue an enforcement order when either party has presented evidence that there is one or more reasons for setting aside the arbitral award provided by the applicable law, for example, if the arbitration agreement is null and void. In this case, the other party may appeal the decision of the authority refusing the enforcement before the same or higher authority.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 deal with only Saudi arbitral awards whereas foreign arbitral awards are enforced by the Board of Grievances which has jurisdiction to enforce foreign judgments and arbitral awards.

The request for enforcement of a Saudi arbitral award is submitted to the

competent authority, such as the Board of Grievances which reviews the merits of the case and makes sure that the award is not contrary to *the Shari'ah* principles and public policy before issuing an enforcement order. Therefore, when the arbitral award contains a decision providing for the payment of interest, the competent authority will delete this decision and enforce the rest of the award if it is possible to separate the decision regarding interest. However, when it is impossible to separate the decisions of the arbitral award, the competent authority will consider the award as null and void award because it is contrary to *the Shari'ah* principles.

When the competent authority grants an enforcement order of the arbitral award, the winner may refer it to the Principality of the province, where the loser resides or has assets, which has considerable powers, such as seizing the loser's property, selling it, and even imprisoning him. The winning party may also have recourse to the Civil Rights Directorate of the Police at the place of residence of the loser which has powers to enforce the arbitral award.

There are two types of foreign arbitral awards which may be enforced in the Kingdom of Saudi Arabia. The first is enforcement of a foreign arbitral award made under a foreign law or under rules of one of the international conventions governing arbitration which is not ratified by the Kingdom of Saudi Arabia. The second is enforcement of a foreign arbitral award made in a contracting state in one of the international conventions ratified by the Kingdom of Saudi Arabia such as the New York Convention of 1958.

When the party wishes to enforce an award from the first type of foreign arbitral awards it should refer the request for enforcement to the Board of Grievances which will apply the reciprocity principle, review the merits of the case, and then issue a final decision which may grant or refuse enforcement of this award. When an enforcement order of the award is granted, the party will then submit this order to the Principality where the other party resides, owns assets or carries out its normal activities. However, when the Board of Grievances refuses to issue an enforcement order of the arbitral award, the party may proceed by way of a new trial instituted in the Kingdom of Saudi Arabia before the competent authority according to the nature and type of the dispute.

The second type of foreign arbitral awards is enforced according to the provisions of an international convention governing arbitration ratified by the Kingdom of Saudi Arabia and by the country where the award is made such as the Washington Convention of 1965 or the New York Convention of 1958.

Finally, it must be noticed that although the Arbitration Regulation of 1983 and its Implementation Rules of 1985 have dealt with many aspects of the arbitral process many questions regarding the arbitration are not treated by the Regulation and its Rules. So, it is recommended that the Saudi legislator make a new regulation governing domestic arbitration and bear in mind the recent changes relating to the commercial sphere and business community, or at least review and modify the provisions of the present Arbitration Regulation and then answer the above questions.

Moreover, it would be helpful if the Saudi legislator would make a regulation dealing with international commercial arbitration held in the Kingdom of Saudi Arabia, because of the increasing importance of the Kingdom of Saudi Arabia as one of the biggest economic countries in the Middle East, and because most important international conventions concerning arbitration as a means of resolving disputes, like the Washington Convention of 1965 and the New York Convention of 1958, have been ratified by the Kingdom of Saudi Arabia. In respect of this matter, the Saudi legislator can benefit from the provisions of the UNCITRAL Model Law of 1985 and from other countries, such as France and Switzerland which have special laws governing international commercial arbitration held in their territories.

Such a regulation would give foreign private parties the confidence in the Saudi legal and judicial systems, and attract them to resolve disputes arising out of their commercial and investment contracts and transactions inside the Kingdom of Saudi Arabia. In addition, it will reduce the resort by foreign private parties to enforce arbitral awards on the assets of Saudi businessmen abroad.

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Table of Appendices

Appendix 1-	Table of Cases
Appendix 2-	Summary of the recommendations
Appendix 3-	The Saudi Arbitration Regulation of 1983.
Appendix 4-	The Implementation Rules of the Arbitration Regulation of 1985.
Appendix 5-	The Articles concerning arbitration mentioned in the Saudi Commercial Court Regulation of 1931.
Appendix 6-	The Articles concerning arbitration mentioned in the Saudi Labour and Workmen Regulation of 1969.
Appendix 7-	The Articles concerning arbitration mentioned in the Saudi Chambers of Commerce and Industry Regulation of 1980.
Appendix 8-	The Articles concerning arbitration mentioned in the Implementation Rules of the Saudi Chambers of Commerce and Industry Regulation of 1981.
Appendix 9-	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
Appendix 10-	The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965.
Appendix 11-	The Convention of the Arab League of Nations Concerning the Enforcement of Foreign Judgments and Awards of 1952.

Part I:

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Part II:

These cases were brought from the Saudi Chambers of Commerce and Industry by which the practical reality concerning domestic arbitration in the Kingdom of Saudi Arabia was clarified. Therefore, it would be better if these cases are translated in brief in English.

- Case of R. Co. for Comm. (Commercial company) v. J. Ins. Co. Ltd. (Jordanian insurance company).

R. for Comm. company (the first party) concluded an insurance contract with J. Ins. Ltd. company (the second party). The policy includes the insurance of the first party's offices, showroom and warehouses against fire, thunderbolts, explosion, earthquakes and flood.

During the insurance contract, fire accident happened in the property of the first party and caused damages. The parties did not reach an agreement in respect of the amounts of the compensation and they submitted their dispute to arbitration.

*** This Case was settled by the Arbitral Award No. 1/1406, dated 12/04/1406 A.H. (1986 A.D.).**

- Case of S. Co. for Comm. & Cont. (Commercial & contracting company) v. Comm. S. Co. (Insurance company).

S. for Comm. & Cont. company (the first party) entered into an insurance contract with Comm. S. company (the second party) with respect to the project of renew of the electrical networks concerning the Royal Palaces in *al-Nāṣiriyyah* in Riyadh by the first party.

During the execution of this project, the first party caused damages electrical cables relating to the Riyadh electricity Company and water pipes. Consequently, the first party fixed these damages and asked the second party to pay the expenses of the repair. However, the second party refused to do so and the two parties referred their dispute to arbitration.

*** This Case was resolved by the Arbitral Award No. 2/1406, dated 26/05/1406 A.H. (1986 A.D.)**

- Case of Mr. S. A. S. (Sudanese natural person) v. U. W. Co. for Ins.(Insurance company) & H. Co. for H. C. (Hire cars company).

Mr. S. A. S. (the claimant) rented a car from H. for H. C. company (the second respondent) for 52 days. During this period, an accident happened between the rented car and a lorry which caused damages in both cars. The police decided that the claimant was responsible for the accident.

The rented car was insured according to the Insurance Policy No. R.D.B.M-500-349 concluded between the U. W. for Ins. company (the first respondent) and the H. for H. C. company (the second respondent). The second respondent asked the first respondent to pay the amounts of damages. The first respondent neglected and postponed to pay the amounts of damages, so the claimant was put in the prison until he fulfils all the required amounts. He stayed in prison around nine months until a third party guaranteed him.

After that, the claimant presented a request for arbitration to the competent authority, which was the Minister of Commerce, asking the two respondents to compensate him in respect of all the damages which happened to him because of their negligence.

*** This Case was settled by the Arbitral Award issued on 16/09/1406 A.H. (1986 A.D.).**

- Case of Mr. N. A. A. R. (Saudi natural person) v. Y. Co. for Ins. Ltd (Insurance company).

Mr. N. A. A. R. (the first party) entered into an insurance contract with Y. for Ins. Ltd. company (the second party). The policy contained the insurance of the first party's jewellery and rugs existing in a special ferrous cabinet in his house against fire and theft. When the first party was in abroad with his family, the jewellery and rugs were stolen from the house during the existence of the insurance contract. The parties did not agree upon the amounts of compensation and they referred the dispute to arbitration.

*** This Case was resolved by the Arbitral Award No. 2/1407, dated 20/04/1407 A.H. (1987 A.D.).**

- Case of M. Co. for Comm. & Dev. Pro. (Commercial company) v. S. N. I. Co. for Ins. (Insurance company).

M. Co. for Comm. & Dev. Pro. (the first party) made an insurance contract with S. N. I. Co. for Ins. (the second party) which relates to the insurance of the first party's warehouse, its contents of furniture and its annexations against fire.

During the insurance contract, fire accident happened in the warehouse and caused damages. The dispute appeared between the two parties in respect to the cost of losses resulting from the fire and the due amount of compensation. They resorted to arbitration to settle their disputes.

*** This Case was decided by the Arbitral Award No. 11/1407, dated 16/08/1407 A.H. (1987 A.D.).**

- Case of S. I. Co. Ltd. (Construction company) v. Mr. F. A. N. (Saudi natural person).

S. I. Ltd. company (the first party) concluded a construction contract with Mr. F. A. N. (the second party) where the first party should build four villas for the second party within fourteen months from the date of the beginning of the work. However, a dispute arose between the two parties with respect to the quality of the used materials and works made by the first party. Therefore, the second party had

recourse to the executive authorities (the Principality and Police) to give him the right to complete the work by another construction company. Because of the existence of an arbitration clause in the main contract, the parties submitted their dispute to arbitration.

*** This Case was settled by the Arbitral award No. 5/1407, dated 19/09/1407 A.H. (1987 A.D.).**

- Case of A. Co. for Comm. & Cont. (Commercial & contracting company) v. A. Elec. Co. (Electricity company).

A. for Comm. & Cont. company (the first party) entered into a contracting contract with A. Elec. company (the second party) with respect to the project of the excavation and distribution of electricity inside 'Arar' city in the Northern Province of the Kingdom of Saudi Arabia.

During the execution of the contract, the first party claimed the second party to pay the expenses of the additional works arising out of the difference of the length of cables and some technical aspect which are not governed by the main contract. However, the second party refused this claims and the two parties referred their dispute to arbitration.

*** This Case was resolved by the Arbitral Award No. 6, dated 19/10/1407 A.H. (1987 A.D.).**

- Case of Civ. W. Co. (Contracting company) v. Int'l. G. Ins. Co. (Insurance company).

Civ. W. company (the first party) made an insurance contract with Int'l. G. Ins. company (the second party). This contract included the insurance of the performance of the project concerning the excavation and distribution of water and sewage pipes in *al-Dammām* city.

During the execution of this contract, the test of these pipes showed the existence of leak in them and some of them were broken. Therefore, the first party claimed the second party to pay the compensations of these damages. But, the second party refused to pay because the first party used bad kinds of pipes and materials. The parties agreed to submit their dispute to arbitration.

*** This Case was decided by the Arbitral Award No. 8/1407, dated 06/03/1408 A.H. (1988 A.D.).**

- Case of I. S. Co. for Cont. Ltd (Sub-contracting company) v. I. C. C. Co. for Const. Ltd. (Korean construction company).

I. S. for Cont. Ltd. company (the first party entered into a sub-contracting contract with I. C. C. for Const. Ltd. company (the second party) in respect of the excavation of a canal for drainage and elimination of rain water in Riyadh.

During the performance of the contract, a dispute occurred between the parties with respect to some technical matters and they submitted it to arbitration.

*** This Case was settled by the Arbitral award No. 4/1408, dated 13/08/1408 A.H. (1988 A.D.).**

- Case of M. Co. for Cont. (Commercial & contracting company) v. S. I. & Comm. Co. Ltd. for Ins. (Insurance company).

M. for Cont. company (the first party) concluded a maritime insurance contract with S. I. & Comm. Ltd. for Ins. company (the second party) in respect to the goods(sugar and rice) shipped to the Kingdom of Saudi Arabia.

When the goods arrived to the port the first party found damages in the goods and asked the second party to compensate it. The dispute arose between them and they agreed to refer it to arbitration.

*** This Case was resolved by the Arbitral Award No. 8/1408, dated 29/08/1408 A.H. (1988 A.D.).**

- Case of Civ. I. Co. (Contracting company) v. Int'l. G. Ins. Co. (Insurance company).

Civ. I. company (the first party) made an insurance contract with Int'l. G. Ins. company (the second party) with respect to the project of drainage of sewage in *al-Dammām* port against flood, explosion and high maritime waves.

During the insurance contract, damages arose from high maritime waves and the first party then claimed the second party to pay the compensation. However, the second party refused that on the basis that the maritime waves were natural and damages were not considered within the insurance contract. The parties submitted the dispute to arbitration.

*** This Case was decided by the Arbitral Award No. 15/1407, dated 18/10/1408 A.H. (1988 A.D.).**

- Case of A. Co. (Contracting company) v. Sh. J. for Ins. Co. (Insurance company).

A. company (the first party) concluded an insurance contract with Sh. J. for Ins. company (the second party) in respect of a project of contracting executed by the first party in Riyadh.

During the execution of the project, the first party caused damages in the high pressure cables relating to Riyadh Electricity company. Accordingly, the first party paid the expenses of the repair and it then claimed the second party to compensate it. However, the second party refused that and the two parties referred their dispute to arbitration.

*** This Case was settled by the Arbitral Award No. 5/1407, dated 11/04/1410 A.H. (1990 A.D.).**

- Case of Nal. Co. for Adm. & Serv. Ltd. (Services company) v. S. Co. Ltd. (Maintenance company).

Nal. for Adm. & Serv. Ltd company (the first party made a contract with S. Ltd company (the second party) by which the first party adhered to present meals to the workers of the second party for three years.

During the performance of this contract, the second party refused to pay the amounts of these meals because the meals and services presented by the first party were bad. Therefore, the two parties agreed to settle their dispute by arbitration.

*** This Case was decided by the Arbitral Award No. 1107/1. k1408, dated 22/08/1410 A.H. (1990 A.D.).**

- Case of H. B. Co. for Comm. (Commercial company) v. I. Co. for Comm. (Insurance company).

H. B. for Comm. company (the first party) concluded two insurance contracts with I. for Comm. company (the second party). The first contract insured the warehouses, goods in these warehouses, their furniture, equipment, and crane against fire and other possible dangers. The second one related to a maritime insurance of four containers containing Pepsi-cola from United States against theft, explosion, war and damage.

During the existence of two contracts, fire accident happened in the warehouses of the first party and caused damages and the Pepsi-cola shipment did not arrive from United States. Therefore, the first party claimed the second party to compensate it. However, the parties did not reach an agreement with respect to the amounts of compensation. So, they submitted the dispute to arbitration.

*** This Case was resolved by the Arbitral Award No. 14/1409. dated 01/09/1410 A.H. (1990 A.D.).**

- Case of S. B. Co. (Industrial company) v. I. A. Serv. Co. for Ins. (Insurance company).

S. B. company (the first party) entered into an insurance contract with I. A. Serv. for Ins. company (the second party). This contract included the insurance of the first party's factory and offices against fire, explosion and other damages.

During the insurance contract, fire accident happened in the factory of the first party and caused damages. The first party asked the second party to compensate it. But, the second party refused that because the reason for fire was not considered a serious reason justifying compensation. The parties submitted their dispute to arbitration.

*** This Case was settled by the Arbitral Award issued on 20/11/1410 A.H. (1990 A.D.).**

- Case of M. Sh. Co. for Comm. (Contracting company) v. A. Co. for T. Cont. (Contracting company).

M. Sh. for Comm. company (the first party) made a sub-contracting contract with A. for T. Cont. company (the second party). According to this contract, the first party adhered to build part of the new motorway in the Central Province.

During the performance of this contract, the second party refused to pay the cost of the executed works by the first party because the first party breached the contract. The two parties agreed to refer the dispute to arbitration.

*** This Case was decided by the Arbitral Award No. 2764/2. k 1409, dated 27/11/1410 A.H. (1990 A.D.).**

- Case of N. I. Co. Ltd. for Ins. (Insurance company) v. I. Co. for Ins. & Re-ins. (Insurance company).

N. I. Ltd. company (the first party) concluded a re-insurance contract with I. for Ins. & Re-ins. company (the second party). This contract re-insured of cars. The dispute arose between the two parties with respect to the period of insurance whether one or three years and then the required amounts according to the contract. The parties submitted the dispute to arbitration.

*** This Case was settled by the Arbitral Award No. 13/1408, dated 16/02/1411 A.H. (1991 A.D.).**

- Case of S. T. Co. (Construction company) v. Mr. A. A. A. (Saudi natural person).

S. T. company (the first party) entered into a construction contract with Mr. A. A. A. (the second party). According to this contract, the first party adhered to

build a building to the second party in Riyadh. The second party refused to pay the final amounts of the first party after the execution of the contract on the basis that the first party did not perform the technical matters required in the contract. The parties referred their dispute to arbitration.

*** This Case was decided by the Arbitral Award No. 10/1409, dated 07/03/1411 A.H. (1991 A.D.).**

- Case of H. M. R. H. Co. for Trans. & Comm. (Commercial company) v. A. Co. for C. C. Ltd. (Commercial company).

H. M. R. H. for Trans. & Comm. company (the first party) concluded a commission contract with A. for C. C. Ltd. company (the second party). According to this contract, the first party sold cement for the second party for a specific commission for each sack.

During the performance of the contract, the two parties disagreed upon the amount required to the first party and they then submitted their dispute to arbitration.

*** This Case was decided by the Arbitral Award issued on 19/05/1411 A.H. (1991 A.D.).**

- Case of Dr. H. B. A. (Saudi natural person) v. G. B. H. Co. Ltd. (Private hospital).

A dispute arose between Dr. H. B. A., who was a partner and director in a private hospital, and other partners with respect to his rights resulting from his work during seven years after his resignation and withdrawal from the company. The parties referred their dispute to arbitration according to the existence an arbitration clause in the main contract.

*** This Case was resolved by the Arbitral Award issued on 27/10/1411 A.H. (1991 A.D.).**

- Case of Ind. G. Co. Ltd. (Contracting company) v. Z. Co. (Contracting company).

The two parties concluded a joint-venture contract by which they were able to build a military training school in *al-Djubayl* city in the Eastern Province. However, they disagreed in respect to the percentage of profit for each one. So, they submitted their dispute to arbitration.

*** This Case was settled by the Arbitral Award No. 1870/1.k 1411, dated 12/09/1412 A.H. (1992 A.D.).**

- *Case of S. A. S. Co. for Agr. (Agriculture company) v. G. F. (Agriculture company).*

S. A. S. for Agr. company (the first party) made a contract with G. F. company (the second party) by which the first party undertook to supply the project of the second party by agricultural machines such as harvester and crane, and to build houses for workers and yards for animals. However, the second party refused to pay the first party's money because the first party breached the contract. The parties referred their dispute to arbitration.

*** This Case was settled by the Amiable Composition Award No. 621/1407, dated 13/09/1412 A.H. (1992 A.D.).**

- *Case of Mr. R. M. R. (Saudi natural person) v. Comm. S. A. R. Co. (Contracting company) & R. H. for Cont. (Sub-contracting company).*

Mr. R. M. R. (the claimant) made a construction contract with Comm. S. A. R. company (the first respondent) where the first respondent adhered to build a hotel in *Nadīrān* city for the claimant during specific time limit. The first respondent abandoned the project to R. H. for Cont. company (the second respondent) after the permission of the claimant.

During the execution of the contract, the claimant refused to pay some instalments to the second respondent on the basis that it was unable to complete the project within the fixed time limit in the contract because it was a small company and did not have enough number of workers. Therefore, the dispute arose and it was referred to arbitration.

*** This Case was resolved by the Arbitral Award No. 1733/1.k 1411, dated 25/09/1412 A.H. (1992 A.D.).**

- *Case of A. Co. for M. Ind. (Industrial company) v. E. Co. (French Industrial company).*

A. for M. Ind. company (the first party) concluded a contract with E. company (the second party) to establish an industrial company which specialises the works of glass. The articles of this contract required from each partner not to compete with the scope of the new company. However, the second party competed with the new company in respect to the execution of glass facades of the project of King *Fahd* International Airport in the Eastern Province. The second party entered into a contract with the main contractor to make the glass facades. So, the first party disagreed with the second party with respect to this matter and the two parties submitted the dispute to arbitration.

*** This Case was settled by the Arbitral Award No. 4/1411, dated 29/12/1412 A.H. (1992 A.D.).**

- Case of A. Co. Dev. (Contracting company) v. Mr. S. A. H. (Saudi natural person).

A. Dev. company (the first party) entered into a construction contract with Mr. S. A. H. (the second party). According to this contract, the first party adhered to build a villa for the second party during twenty one months from the date of beginning of the work.

During the performance of the contract, the second party requested from the first party to make some changes. The first party agreed upon these changes provided of the amount of the contract raises. However, during the execution of the project, a dispute arose between the two parties because the second party refused to pay some required amounts to the first party. So, they referred their dispute to arbitration.

*** This Case was resolved by the Arbitral Award issued on 27/05/1414 A.H. (1994 A.D.).**

- Case of H. Co. for Comm. & Cont. (Commercial & contracting company) v. I. D. Co. (Contracting company).

H. for Comm. & Cont. company (the first party) concluded a sub-contracting contract with I. D. company (the second party) by which the first party assumed to execute contracting works with respect to the project of housing of the air defence troops in *al-Zahrān* city. However, the second party refused to give the first party some payments because the first party breached the sub-contracting contract. Then, they submitted their dispute to arbitration.

*** This Case was decided by the Arbitral Award issued on 02/06/1414 A.H. (1994 A.D.).**

- Case of S. Co. for Cat. Trans. & Comm. (Commercial company) v. S. S. B. D. Co. (Italian maritime transport company).

S. for Cat. & Comm. company (the first party) entered into a maritime transport contract with S. S. B. D. company (the second party) where the second party assumed to transport sheep from Australia to the Kingdom of Saudi Arabia for the first party. When the ship arrived to *al-Dammām* port, the Saudi authorities refused to unload the ship in the port because the sheep were ill. So, the second party attempted to sell the sheep in another country after the consultation with the first party. The second party sold the sheep in the United Arab Emirates. After that the second party requested from the first party to pay the transport charges and the additional charges. However, the first party refused to pay these charges and the two parties agreed to settle their dispute by arbitration.

*** This Case was resolved by the Arbitral Award No. 954/1.k, dated 28/08/1414 A.H. (1994 A.D.).**

Appendix 2

Summary of the recommendations

It would be better to summarise the recommendations mentioned in this thesis in a separate appendix. This appendix will help the Saudi legislator to be aware of the aspects and questions which are not treated in the provisions of the Arbitration Regulation of 1983 and its Implementation Rules of 1985. These questions should be treated in any review and revision to the present Regulation or in any new arbitration regulation made in future.

The most important recommendations can be summarised as follows:

The Saudi legislator should-

1- give the Saudi Chambers of Commerce and Industry the power to administer the arbitration under their auspices according to the arbitration provisions mentioned in their Regulation of 1980 and its Implementation Rules of 1981.

2- expressly confirm the separability of an arbitration clause from the main contract concluded between the parties.

3- revise the terminology of the Arbitration Regulation of 1983 and its Implementation Rules of 1985 in respect of the use of the terms “arbitration agreement”, “arbitration clause” and “submission agreement” throughout the Regulation and Rules.

4- recognise the validity of an arbitration agreement made by one of the modern means of communications, such as fax.

5- grant the Government and its Agencies the ability to have recourse to arbitration without any restriction to resolve their disputes with private parties.

6- stipulate the production of an arbitration agreement before taking any step in court proceedings or the party will lose the right to stay these proceedings as there is an arbitration agreement if he has participated in them.

7- determine a specific time within which the parties to the dispute appoint arbitrators. Otherwise, the competent authority will do that.

8- explicitly require sufficient experience, impartiality and independence in a person who wishes to act as an arbitrator.

9- give a clear answer with respect to the ability of women to act as arbitrators.

10- require that at least one of the members of the arbitral tribunal should be a *Shari'ah* scholar or a lawyer because this requirement will help to treat any legal problem arising during the arbitral process.

11- determine the conditions in which an arbitrator may be liable to either party to the dispute, such as when he makes a serious lapse in bad faith, like accepting of bribe.

12- give a clear answer with respect to the finality of the decision of the competent authority regarding the fees and expenses of arbitrators.

13- expressly require that the arbitration should take place inside the Kingdom of Saudi Arabia in domestic arbitration.

14- give a clear answer to the ability of foreigners to act as representatives of the parties to the dispute before the arbitral tribunal.

15- grant the other arbitrators the power to proceed in holding deliberations and to issue the award when an arbitrator refuses to participate in deliberations.

16- give an answer to the question which may arise when there is not a majority vote to make the arbitral award by giving the presiding arbitrator the power to issue the award alone or by giving the competent authority the power to decide the case.

17- deal with the question of the validity of the arbitral award made after the expiry of the time limit of arbitration and the question of the expiry of the time limit of arbitration without making an arbitral award.

18- explicitly grant arbitrators the power to make interim, partial and additional awards during the arbitral process.

19- treat the question of the validity of the arbitral award when arbitrators do not respect one or more of the formalities required in the form of the award by giving the competent authority to hear the dispute the power to consider each case and then to remit or set aside the arbitral award.

20- codify the practical reality concerning the question of dissenting opinions where the refusing arbitrator signs the award, and writes his dissenting opinions in a separate document and attaches it to the original copy of the arbitral award.

21- give the competent authority to hear the dispute the power to decide to accept or refuse the request for registration of the arbitral award submitted to it after the expiry of the time limit.

22- fix a specific time within which the request for correction or interpretation of the arbitral award should be referred to the arbitral tribunal.

23- determine specific grounds upon which the arbitral award may be challenged before the competent authority which should examine only these grounds without reviewing the merits of the dispute.

24- give a clear answer with respect to the position when the request for challenge of the arbitral award is submitted after the expiry of the statutory time limit.

25- expressly state that the decision of the competent authority to hear the dispute concerning objection of the arbitral award is final and enforceable.

Appendix 3

The Arbitration Regulation **Royal Decree M/46 of 12/07/1403 A.H. (25/04/ 1983 A.D.)** **(unofficial translation)**

Article 1.

The parties may agree to arbitrate a specific existing dispute; a prior agreement to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract.

Article 2.

Arbitration shall not be permitted in cases where a settlement is not allowed. An agreement to arbitrate may not be made except by those who have capacity to act.

Article 3.

Government Agencies are not allowed to resort to arbitration for the settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This provision may however be amended by resolution of the Council of Ministers.

Article 4.

The arbitrator shall have expertise and be of good conduct and behaviour, and shall have full legal capacity. If there are several arbitrators, their number must be uneven.

Article 5.

The parties to the dispute shall file the arbitration instrument with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorised attorneys, and by the arbitrators, and it must state the subject-matter of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached.

Article 6.

The Authority originally competent to hear the dispute shall record the applications for arbitration submitted to it, and take a decision approving the arbitration instrument.

Article 7.

If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject-matter of the dispute shall be heard only according to the provisions of this Regulation.

Article 8.

The Clerk of the Authority originally competent to hear the dispute shall be in charge of all the notifications and notices provided for in this Regulation.

Article 9.

The arbitrators' decision shall be taken within the time limit specified in the arbitration instrument, unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within ninety days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject-matter or extending the time limit for another period.

Article 10.

If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s), or if one or more of the arbitrators refuses to assume his task or withdraws, or something prevents him from carrying out his task, or if he is dismissed, and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrator upon request of the party who is interested in expediting the arbitration, in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final.

Article 11.

The arbitrator may not be removed except with the mutual consent of the parties, and the arbitrator so removed may claim compensation if he had already proceeded and if he had not been the cause of such removal. Furthermore, he cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument.

Article 12.

The arbitrator may be challenged for the same reasons for which a judge may be challenged. The request for challenge shall be submitted to the Authority originally competent to hear the dispute within five days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred. The request for challenge is examined at a hearing, both parties, as well as challenged arbitrator being summoned.

Article 13.

The arbitration shall not terminate because of the death of one of the parties, but the time fixed for award shall be extended by thirty days unless the arbitrators decide on a further extension.

Article 14.

If an arbitrator is appointed in place of the removed arbitrator or the one who has withdrawn, the date fixed for the award shall be extended by thirty days.

Article 15.

The arbitrators may, by the majority by which the award shall be made, and through a justified decision, extend the periods fixed for the award on account of circumstances pertaining to the subject-matter of the dispute.

Article 16.

The decision of the arbitrators shall be taken by a majority vote but if they are authorised to reach a settlement, their decision shall be made unanimously.

Article 17.

The award shall notably include the arbitration instrument, a summary of the arguments of the parties and their documents, reasons for the award and its text and date, and the signatures of the arbitrators. If one or more of them refuse to sign the award, such refusal shall be stated in the award document.

Article 18.

All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them. The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final.

Article 19.

If the parties or one of them submitted an objection against the award of the arbitrators within the period provided for in the preceding Article, the Authority originally competent to hear the dispute shall consider the dispute and shall either dismiss the objection and issue an order for enforcement of the award, or accept the objection and decide the case.

Article 20.

The award of arbitrators shall be enforceable, when it becomes final, by an order from the Authority originally competent to hear the dispute. This order shall be issued upon request of one of the concerned parties after confirming that there is nothing to prevent its execution in *Sharī'ah*.

Article 21.

An award made by the arbitrators, when it becomes final, by an order of enforcement in accordance with the preceding Article, shall be enforceable as effective as a judgment made by the Authority which issued the order of enforcement.

Article 22.

Fees of arbitrators shall be determined by agreement between the parties and unpaid sums of such fees shall be deposited with the Authority originally competent to hear the dispute within five days after approval of the arbitration instrument, and

shall be paid within a week from the date on which the order for enforcement of award is issued.

Article 23.

If there is no agreement on the fees of arbitrators, and a dispute ensues, the matter shall be settled by the Authority originally competent to hear the dispute, which decision shall be final.

Article 24.

The decisions required for the execution of this Regulation shall be issued by the President of the Council of Ministers, on the basis of a proposal made by the Minister of Justice after agreement with the Minister of Commerce and the President of the Board of Grievances.

Article 25.

This Regulation shall be published in the Official Gazette, and shall be effective thirty days after the date of its publication.

Appendix 4

The Implementation Rules of the Arbitration Regulation of 1983 The Council of Ministers Resolution No. 7/2021/M of 08/09/1405 A.H. (27/05/1985 A.D.) (Unofficial translation)

Chapter I Arbitration, Arbitrators and Parties

Article 1.

Arbitration in matters wherein conciliation is not permitted, such as *Ḥudūd*^{*} and *Li'ān*^{**} between spouses, and all matters relating to the public order, shall not be accepted.

Article 2.

The agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorised to do so by the competent court.

Article 3.

The arbitrator shall be a Saudi national or Muslim expatriate from the free professions or others. The arbitrator may also be an employee of the State, provided approval of the Department to which he belongs is obtained. In the case of more than one arbitrator, an umpire must have knowledge of *the Sharīah* rules, commercial regulations, customs and traditions applicable in the Kingdom of Saudi Arabia.

Article 4.

Any person having an interest in the dispute or having been sentenced to a *Ḥad*^{***} or penalty in a crime of dishonour, dismissed from a public position following a disciplinary order, or adjudicated as bankrupt, unless reinstated, may not act as an arbitrator.

Article 5.

Without prejudice to the provisions of Articles 2 and 3 above, a list containing the names of arbitrators shall be prepared by agreement among the Minister of Justice, the Minister of Commerce and the Chairman of the Board of Grievances. Courts, Judicial Committees, and Chambers of Commerce and Industry shall be informed of such lists and respective parties may select arbitrators from these lists or from others.

* *Ḥudūd* are the crimes which *the Qur'an* specified their punishments, such as the amputation of the hand in the crime of the theft.

** *Li'ān* is a *Sharīah* procedure for the separation between spouses in the case of accusation of adultery with lack of proof.

*** *Ḥad* is the singular of *Ḥudūd* in (*) above.

Article 6.

The arbitrator(s) is appointed by agreement of the parties in an arbitration agreement which shall sufficiently outline the dispute and the names of the arbitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract.

Article 7.

The Authority originally competent to hear the dispute shall approve the arbitration instrument within fifteen days and notify its decision to the arbitral tribunal.

Article 8.

In disputes where a Government Authority is party with others and decides to arbitrate, such Authority shall prepare a memorandum with respect to arbitration in the dispute, stating the subject-matter, the reasons for arbitration and the names of the parties to be submitted to the Council of Ministers for the approval of the arbitration. The President of the Council of Ministers may, by a prior resolution, authorise a Government Authority to settle disputes arising from a particular contract, through arbitration. In all cases, the Council of Ministers shall be notified of the arbitration awards adopted.

Article 9.

The clerk of the Authority originally competent to hear the dispute shall act as secretary for the arbitration proceedings. He shall establish the necessary records for registration of arbitration requests and shall submit the same to the concerned authority for the confirmation of the arbitration instrument. He shall proceed to all notifications and notices provided for in the arbitration regulations and any other assignments determined by the competent Minister. The competent authorities shall make the necessary arrangements regarding the above.

Article 10.

The arbitral tribunal shall fix a date for the first hearing of the dispute within no later than five days from the date it is notified of the confirmation of the arbitration instrument. It shall notify this to the parties through the clerk of the Authority originally competent to hear the dispute.

**Chapter II Notification of Parties, Appearance,
Default and Representation during the Proceedings****Article 11.**

All notices and communications to the parties to the arbitration are made through the clerk of the authority originally competent to hear the dispute. They are sent through a bailiff or official Authorities, whether such notice or communication stems from the parties or the arbitrators. The police shall help the competent Authority in performing its duties within their prescribed jurisdictions.

Article 12.

The notice shall be in Arabic and in two, or more copies, according to the number of the parties. Copies shall contain the following particulars:

- a- The date, day, month and year in which such notice is made.
- b- The name, surname, title, profession and domicile of the party requesting the notice, and the name, surname, title, profession and domicile of his representative, if he is working for another.
- c- The name of the bailiff giving the notice, his address and his signature on the original and copy of the notice.
- d- The name, surname, profession and domicile of the person to be notified, and if his domicile is not known at the time of the issue of the notice, then his last known domicile.
- e- The name and profession of the person to whom the copy of the notice has been served, and his signature of the original indicating receipt, or, as the case may be, a note of his refusal to sign the original when it is returned to the concerned authority.
- f- The name of the arbitral tribunal, its seat, the subject-matter of notice and the date specified therefor.

Article 13.

The document which are the subject-matter of the notice shall be delivered to the person, or to his place of domicile, and may be delivered to the chosen place of domicile determined by the concerned parties. In case the person required to be notified is not present in his place of domicile, the notices shall be delivered to the person who acknowledges being his representative, responsible for the administration of his business, works for him, or that he or she lives with the person such as husband, wife, parent or servant.

Article 14.

If the bailiff does not find the proper person to whom to deliver the documents pursuant to the preceding section, or the person of these found there refused to accept the documents, the bailiff shall state that on the original and deliver it on the same day to the police commissioner or mayor or the representative of either of them, where the residence of the person summoned falls within their authority as the case may be. The bailiff shall also within twenty-four hours send the person summoned at his original or chosen domicile a registered letter informing him that a copy has been given to the administration. He shall also state all these details on both the original and copy of the notice. The notice shall be considered valid and effective from the time of the delivery of the copy in the afore-mentioned way.

Article 15.

Except as provided for in special regulations, the copy of the notice shall be delivered in the following manner:

- a- In matters relating to the State, it shall be delivered to the Ministers, Province Governors, Directors of Government Departments or their representatives.
- b- In matters relating to public persons, to the person acting on its behalf

according to the law, or his deputy.

- c- In matters relating to private companies, societies and establishments, it shall be delivered at their head offices, as indicated in the Commercial Register, to the chairman, general manager or his representatives among the employees. With respect to foreign companies having branches or agents in the Kingdom of Saudi Arabia, the papers shall be delivered to the branch or agent.

Article 16.

The competent official shall refer the arbitration file to the Authority originally competent to hear the dispute to decide on the confirmation of the arbitration instrument. The clerk of this Authority shall notify the arbitrators and the parties if its decision on such confirmation within the week following its decision.

Article 17.

On the date of the hearing, the parties shall appear in person or through a representative holding a power of attorney executed before a notary public or any other official authority, or certified by a Chamber of Commerce and Industry. A copy of the power of attorney is included in the file after the tribunal has examined the original but the tribunal may request the party to appear in person should this be thought necessary.

Article 18.

If one of the parties does not appear at the first hearing, the arbitral tribunal may, after confirming that the party has been notified in person, decide the dispute if the parties have delivered their respective submissions, defence, claims and documents. In such a case, the award is deemed to have been made in the presence of the absent party. If the absent party has not been notified in person the arbitral tribunal should postpone consideration of the case and notify that party of the date of the next hearing.

Where there are several defendants, and one or more of them have been notified in person, then if those who have not been notified in person do not appear, the arbitral tribunal(except in cases of urgency) should postpone consideration of the case to another date to be notified to the absent defendants. Any subsequent award is then deemed to have been made in presence of all the parties.

The award is deemed to have been made in presence of all the parties if the party or his representative appears at any of the hearings or submits its memoranda or any document relating thereto. If the absent party appears before the end of the hearing, any decision which may have been taken during such hearing before is deemed to be non-existent.

Article 19.

If it appears to the arbitral tribunal that the notice given to the defaulting party is invalid, it should postpone consideration of the case to another hearing, the date of which should be validly notified to that party.

Article 20.

The case is heard in public by the arbitral tribunal unless the arbitral tribunal considers that it should be heard in private. Either of the parties may also request that the case be heard in private, but the arbitral tribunal has discretion to reject this.

Article 21.

Without valid reasons, the hearings may not be postponed more than once for the same justification as given by one party for the first postponement.

Article 22.

The arbitral tribunal must allow each party to present its arguments and evidence either orally or in writing, in a convenient manner and at the dates fixed by such tribunal.

The defendant must be the last party to speak and thereafter the arbitral tribunal must complete the case and make a decision.

Article 23.

The chairman of the arbitral tribunal directs the sessions and questions the parties and the witnesses. He is empowered to exclude any person from the room who would disrupt the proceeding. If any infringement of the rules is committed by one of the parties during the session, the incident is recorded in the minutes which are sent to the Authority originally competent to hear the dispute. Each of the arbitrators may question the parties or their witnesses or discuss the case with them through the intermediary of the chairman.

Article 24.

At any stage of the proceedings, the parties may request the arbitral tribunal to record in the minutes that they have agreed on an acknowledgement, settlement, waiver or some other agreement. The arbitral tribunal must decide on this.

Article 25.

Arabic is the official language and must be used for all oral or written submissions to the arbitral tribunal. The arbitrators as well as any other persons present can only speak in Arabic and a foreigner unable to do so must be accompanied by a sworn translator who shall sign with him the record of his oral arguments in the minutes.

Article 26.

Either party may request the postponement of the proceedings by a period (the duration of which is left to the arbitral tribunal) so that it can present any documents, papers or make any observations which might be useful which are or likely to have any influence on the case. The arbitral tribunal may decide on a further postponement if it considers that this is justified.

Article 27.

Minutes of the proceedings shall be drafted by the secretary of the arbitral tribunal under its supervision must contain the date and place of the session, the names of the arbitrators, the secretary and the parties and also what has been said by the parties and the arbitrators. They should be signed by the chairman of the arbitral tribunal, the arbitrators and the secretary.

Article 28.

The arbitral tribunal may upon either its own motion or the request of one of the parties, force the other party to present any document relevant to the case, where:

- a- The document is common to both parties. A document is deemed common to both parties if it has been drafted in the interest of both parties or if it proves their reciprocal rights and obligations.
- b- The other party relied on this document at any stage during the proceedings.
- c- The law so authorises.

The request for production of a document should contain:

- 1- a description of the document;
- 2- its nature with as many details as possible;
- 3- the facts proving its existence;
- 4- the facts and circumstances confirming that the other party holds such document;
- 5- the manner of forcing the party to present it.

Article 29.

The arbitral tribunal may order any investigative measure useful for the proceedings, if the facts to establish concern the dispute, have an influence thereon and are acceptable.

Article 30.

The Arbitral tribunal may modify the investigative measures it has order provided it gives the reasons for such modification in the minutes of the session. It may not take into account the results of any investigation provided it gives the reasons therefor in the award.

Article 31.

Any party which requests that a witness be heard must indicate either orally or in writing the facts to be established during the hearing. The party must be accompanied by the witnesses which it request to be heard at such hearing. The hearing of the witnesses takes place according to the rules of the applicable law. The other party is entitled to deny these facts according to the same rules.

Article 32.

The arbitral tribunal may examine the parties either upon its own motion or upon request of one of the parties.

Article 33.

If necessary, the arbitral tribunal may be assisted by one or more experts charged with presenting a technical report on certain questions or technical matters and materials which may have a bearing on the case. In its award, the arbitral tribunal should indicate in detail the mission of the expert and any urgent measures it authorised him to take. The arbitral tribunal determines the expert's fees and the party who must pay these. If the fees are not deposited by either one party or the other, the expert is not bound to perform his mission and in this case, the right to put forward the decision to appoint the expert is extinguished if the arbitral tribunal deems that the pretext invoked for this is not acceptable. In performing his mission, the expert must hear the parties or on other persons, he must present a report on his work and give his opinion within the fixed time. During the session, the arbitral tribunal may examine the expert on his report. If there are several experts, the arbitral tribunal must determine their manner of working and whether or not they must work together or separately.

Article 34.

The arbitral tribunal may request from the expert an additional report in order to fill any gap left in the first report. The parties may also present consultant's reports to the arbitral tribunal. In all cases, the arbitral tribunal is not bound by the opinion of such experts or consultants.

Article 35.

The arbitral tribunal, either upon its own motion or upon request of one of the parties, may decide to visit certain places in order to verify any facts relevant to the case. It must then draft minutes of the proceedings of such visit.

Article 36.

The arbitral tribunal must respect the rules of procedure before the courts and in particular it must guarantee the respect of the principle of a fair hearing and ensure that each party is informed of the proceedings and is allowed an adequate time to consider the documents and evidence relevant to the case. The arbitral tribunal must also grant the parties sufficient time to present their documents, and arguments in writing or orally during the hearing. Any oral arguments are recorded into the minutes.

Article 37.

If, during the arbitration, anything arises which is not within the jurisdiction of the arbitrators, or if it is alleged that any evidence is forged, or if forgery proceedings are started against any party or if there is any criminal incident, the arbitral tribunal shall suspend its work, and the time limit for the arbitration until a final judgment is given on this question by the relevant authority.

Article 38.

When all investigations are finished, the arbitral tribunal shall close the hearings and start deliberations. These deliberations must be in secret and only the entire arbitral tribunal must be present. The arbitral tribunal determines the date at which the award shall be made when it closes the hearing, or at another hearing, provided it respects the provisions of Articles 9, 13, 14 and 15 of the Arbitration Regulation.

Article 39.

The award is made by the arbitrators who are only bound to comply with the rules of procedure contained in the Arbitration Regulation and its Implementation Rules. The award must comply with *the Sharī'ah* principles and the regulations in force.

Article 40.

Once the hearing is closed, the arbitral tribunal may not obtain any comment from either of the parties unless this is made in presence of the other party and it may not accept any submission or documents from one of the parties unless these are also sent to the other party. Should it be of the opinion that these documents are useful for the case, the arbitral tribunal must extend the period for making its award and re-open the hearing by giving the reasons for this decision. It must also notify the parties of the date fixed for further consideration of the case.

Article 41.

Without prejudice to Articles 16 and 17 of the Arbitration Regulation, arbitral awards must be made by a majority of votes. The award must be read by the Chairman of the arbitral tribunal at the hearing for this. It must contain the name of the arbitrators, the date and place where it was made, its subject-matter, the names, first names and qualities of the parties, the domicile of each of them, the indication whether they appeared or not, a summary of the facts, the requests of the parties, a summary of their means and defences as well as the reasons and the decision. The arbitrator and the secretary shall sign the original copy of the award and this copy shall be joined to the file of the case within seven days following the filing of the award.

Article 42.

Without prejudice to Articles 18 and 19 of the Arbitration Regulation, the arbitral tribunal itself corrects any material errors contained in the award upon either its own motion or upon the request of one of the parties, and without hearing the parties. The corrections must be made on the original of the award and must be signed by the arbitrators. If the arbitral tribunal has exceeded its powers, the parties may request the setting aside of corrections. A refusal to rectify any material errors may not be appealed against separately.

Article 43.

The parties may request the arbitral tribunal to interpret any ambiguity contained in its award. Such interpretation is deemed to complete the arbitral award in all respects and it is subject to the same rules of appeal as the award itself.

Article 44.

Once leave to enforce is granted, the award is enforceable. The clerk of the Authority originally competent to hear the dispute shall deliver to the party in favour of whom the award was made, a copy of the award endorsed with a note that leave to enforce has been granted as follows:

“ Any administration and competent authority is requested to enforce this award by any means in force, if need be, by using force with the contribution of the police”

Article 45.

If some claims of each party are rejected, the arbitrator may spread his fees amongst the parties according to the estimation made by the Authority originally competent to hear the dispute. Likewise, he can impose his fees totally on one party.

Article 46.

Each of the parties may appeal against the decision of estimation of the fees of the arbitrators before the authority which made such decision within eight days following the date of notification thereof. The decision made following this recourse is final.

Article 47.

The relevant authorities must apply these Rules.

Article 48.

These Rules shall be published in the Official Gazette. It shall come into force on the date of its publication.

Appendix 5

The Articles concerning the Arbitration mentioned in the Commercial Court Regulation*

**Royal Decree No. 32 of 15/01/1350 A.H. (06/06/1931 A.D.)
(unofficial translation)**

Article 493.

If the contesting parties agree upon a person or persons qualified to arbitrate the case, they shall so state in a written statement certified by the official court notary. The statement shall include all the terms of the arbitration including its time limits. The statement shall be signed by all concerned parties and a copy delivered to the arbitrator(s).

Article 494.

The arbitrators shall review the statement of the two parties concerning their assets, papers and documents, and the testimony of their witnesses. On the basis of this review, they shall decide the case according to the terms of the arbitration agreement.

Article 495.

If it appears that the decision of the arbitrators is in accordance with the terms of the arbitration agreement, the court shall then endorse it and it shall be implemented. Otherwise, it shall be revoked by the commercial court.

Article 496.

Neither of the two parties may, either before or after a decision is made, dismiss any arbitrator whom they have accepted and whose appointment has been endorsed by the commercial court. However, the contesting parties have the right to protest the decision of the arbitrators before the commercial court.

Article 497.

The arbitrators, weather they are court officials or members of an elected committee, must submit a copy of their decision, signed by each of them, to the court. After reviewing the decision, the court shall endorse it if it complies with the terms of the arbitration agreement.

* These Articles were abrogated by the issue of the arbitration Regulation of 1983.

Appendix 6

The Articles concerning the Arbitration mentioned in the Labour and Workmen Regulation Royal Decree No. M/21 of 06/09/1389 A.H. (15/11/1969 A.D.) (Unofficial translation)

Article 183.

In all cases, the parties to a dispute may by mutual agreement appoint one arbitrator for both of them, or one or more arbitrators for each party so that the arbitrator(s) may settle the dispute in lieu of the Commissions provided for in this Chapter.

Where the arbitrators fail to select an umpire, the Chairman of the Primary Commission in whose circumscription the place of work is located shall appoint the said umpire, if such an umpire has not already been appointed in the arbitration agreement. The arbitration agreement shall indicate the time-limits and the rules of procedure to be followed in order to settle the dispute. The arbitrators' award shall be of first instance and appealable before the Supreme Commission within the time-limits, time-extensions and the rules of procedure prescribed for the appeal of decisions before the said Commission, unless the arbitration agreement expressly provides that the arbitrators' award shall be definitive, in which case such award shall be irrevocable.

A copy of the arbitration agreement shall be deposited with the Office of the appropriate Primary Commission in the area, and the arbitrators' award shall be registered with the Office of the said Commission within one week of its rendering.

Article 184.

The arbitrators' awards shall be executed after registration with the Office of the appropriate Primary Commission, and after due endorsement execution by the Chairman of the Commission.

Article 187.

In the course of conciliation and arbitration proceedings before any of the Commissions provided for in this Chapter, the employer may not so change the terms of employment which were in force before the commencement of such proceedings as to cause prejudice to the worker who will suffer loss or to be dismissed or fined, without a written permit from the appropriate Primary Commission.

Appendix 7

The Articles concerning the Arbitration mentioned in the Chambers of Commerce and Industry Regulation Royal Decree No. M/6 of 22/04/1400 A.H. (03/09/1980 A.D.) (unofficial translation)

Article 5.

The Chambers of Commerce and Industry are authorised in the following matters:

- (H)- The settlement of commercial and industrial disputes by arbitration if the parties to the dispute agree to refer the dispute to them.

Article 11.

A Chamber shall have a General Assembly and a Board of Directors.

Article 24.

The Board of Directors shall handle the affairs of the Chamber. It shall have all authority to realise its purposes. It may issue what it sees necessary of Financial, administrative by-laws and instructions. It may form committees and delegate authority to ensure the good conduct of work at the Chamber.

Article 37.

A Board for all the Chambers of Commerce and Industry is formed to take care of the mutual interests among them. The Board shall enjoy legal personality, its seat will be in Riyadh and it shall have the following functions:

- (3)- The exercise of arbitration and the settlement of commercial and industrial dispute if the parties to the dispute agree to refer it to them, and where the parties belong to more than one Chamber or one of the parties were a national and the other a foreigner.

Appendix 8

The Articles concerning the Arbitration mentioned in the Implementation Rules of the Chambers of Commerce and Industry Regulation of 1980

**The Minister of Commerce Resolution No. 1871
of 22/05/1401 A.H (27/03/1981 A.D.)
(Unofficial translation)**

Article 49.

Where two merchants or industrialists belonging to one Chamber of Commerce and Industry agree to resolve a dispute between them by arbitration they shall present a written application signed by them to the Chairman of the Board of Directors of the Chamber. Each party shall appoint an arbitrator for himself and the Chairman of the Chamber shall appoint a neutral arbitrator to chair the arbitration committee.

Article 50.

The Chairman of an arbitration committee shall fix a time to view the dispute and notify the members of the committee and the parties to the dispute.

Article 51.

Either party may delegate someone to represent him to attend before a committee.

Article 52.

Where a member of an arbitration committee does not appear or excuse himself from attendance, the Chairman of the Chamber shall appoint someone to replace him.

Article 53.

A dispute shall be decided within three months from the date of the first session. The Chairman and the member of the committee shall sign the issued award and shall notify the parties to the dispute with a copy thereof.

Article 54.

Where contending adversaries belong to more than one Chamber of Commerce and Industry or where one of them is a foreigner they shall present the petition for arbitration to the Chairman of the Board of the Chambers of Commerce and Industry. The arbitration will take place in accordance with Article 50, 51, 52 and 53 of the By-laws.

Article 69.

The Board of Chambers of Commerce and Industry shall set the rules concerning the running of its work and issue the financial and administrative By-laws necessary for the handling of its affairs. It shall exercise all authority that will enable it to realise its purposes.

Appendix 9

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, 10 June 1958; entered into force, 7 June 1959

Article I.

1- This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2- The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3- When signing, ratifying and acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II.

1- Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2- The term “agreement in writing” shall include an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3- The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III.

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the

recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV.

1- To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a)- The duly authenticated original award or a duly certified copy thereof;
- (b)- The original agreement referred to in article II or a duly certified copy thereof.

2- If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V.

1- Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a)- The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b)- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c)- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d)- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e)- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2- Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a)- The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b)- The recognition and enforcement of the award would be contrary to the public policy of that country.

Article VI.

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII.

1- The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting State nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2- The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and the extent that they become bound, by this Convention.

Article VIII.

1- This Convention shall be open until December 31, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2- This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX.

1- This Convention shall be open for accession to all States referred to in article VIII.

2- Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X.

1- Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2- At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3- With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI.

In the case of a federal or non-unity State, the following shall apply:

(a)- With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b)- With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c)- A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII.

1- This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2- For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit of such State of its instrument of ratification or accession.

Article XIII.

1- Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2- Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3- This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV.

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV.

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a)- Signatures and ratifications in accordance with article VIII;
- (b)- Accessions in accordance with article IX;
- (c)- Declarations and notifications under articles I, X and XI;
- (d)- The date upon which this Convention enters into force in accordance with article XII;
- (e)- Denunciations and notifications in accordance with article XIII.

Article XVI.

1- This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2- The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Appendix 10

Convention on the Settlement of Investment Disputes between States and Nationals of Other States Done at Washington, 18/03/1965; entered into force, 14/10/1966

Preamble

The Contracting States, Considering the need for international co-operation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognising that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognising that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

Chapter I International Centre for Settlement of Investment Disputes

Section 1 Establishment and Organisation

Article 1

(1)- There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2)- The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators

Section 2

The Administrative Council

Article 4

(1)- The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2)- In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

Article 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1)- Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;
- (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2)- The Administrative Council may appoint such committees as it considers necessary.

(3)- The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1)- The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2)- Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3)- A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4)- The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1)- The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election.

After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2)- The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3)- During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the

appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4

The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

(1)- Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2)- The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14

(1)- Persons designated to serve on the Panels shall be persons of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2)- The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

(1)- Panel members shall serve for renewable periods of six years.

(2)- In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3)- Panel members shall continue in office until their successors have been designated

Article 16

(1)- A person may serve on both Panels.

(2)- If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3)- All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Section 5

Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity:

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities, and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where proceedings are held.

Article 23

(1)- The archives of the Centre shall be inviolable, wherever they may be.

(2)- With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organisations.

Article 24

(1)- The Centre, its assets, property and income, and its operations and transactions authorised by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2)- Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3)- No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

Chapter II

Jurisdiction of the Centre

Article 25

(1)- The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2)- National of another Contracting State “means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3)- Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4)- Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1)- No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2)- Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Chapter III

Conciliation

Section 1

Request for Conciliation

Article 28

(1)- Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2)- The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3)- The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Conciliation Commission

Article 29

(1)- The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(2)- (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed

Article 31

(1)- Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2)- Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3

Conciliation Proceedings

Article 32

(1)- The Commission shall be the judge of its own competence.

(2)- Any objection by a party to the dispute that that dispute is not within the Jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

(1)- It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall co-operate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2)- If the parties reach agreement, the commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall

draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

Chapter IV

Arbitration

Section 1

Request for Arbitration

Article 36

(1)- Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2)- The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3)- The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Tribunal

Article 37

(1)- The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2)- (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed.

Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member the Tribunal has been appointed by agreement of the parties.

Article 40

(1)- Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2)- Arbitrators appointed from outside the Panel of arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3 Powers and Functions of the Tribunal

Article 41

(1)- The Tribunal shall be the judge of its own Competence.

(2)- Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

(1)- The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2)- The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3)- The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to

arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1)- Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2)- If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that the party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4

The Award

Article 48

(1)- The Tribunal shall decide questions by a majority of votes of all its members.

(2)- The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3)- The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4)- Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5)- The Centre shall not publish the award without the consent of the parties.

Article 49

(1)- The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2)- The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of

time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5 Interpretation, Revision and Annulment of the Award

Article 50

(1)- If any dispute arises between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2)- The request shall, if possible, be submitted to the tribunal which rendered the award. If this shall not be possible, a new tribunal shall be constituted in accordance with Section 2 of this Chapter. The tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1)- Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2)- The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3)- The request shall, if possible, be submitted to the tribunal which rendered the award. If this shall not be possible, a new tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4)- The tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the tribunal rules on such request.

Article 52

(1)- Either party may request annulment of the award by an application addressed to the Secretary-General on one or more of the following grounds:

- a- that the tribunal was not properly constituted;
- b- that the tribunal has manifestly exceeded its power;
- c- that there was corruption on the part of a member of the tribunal;
- d- that there has been a serious departure from a fundamental rule of procedure;
- e- that the award has failed to state the reasons on which it is based.

(2)- The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3)- On the receipt of the request, the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members

of the Committee shall have been a member of the tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4)- The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5)- The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6)- If the award is annulled the dispute shall, at the request of either party, be submitted to a new tribunal constituted in accordance with Section 2 of this Chapter.

Section 6 Recognition and Enforcement of the Award

Article 53

(1)- The award shall be binding on the parties and shall not be subject to any appeal or to any remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2)- For the purpose of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1)- Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2)- A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3)- Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Chapter V

Replacement and Disqualification of Conciliators and Arbitrators

Article 56

(1)- After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2)- A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3)- If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

Chapter VI

Cost of Proceedings

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

(1)- Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with Secretary-General.

(2)- Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

(1)- In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2)- In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Chapter VII

Place of Proceedings

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

Chapter VIII

Disputes between Contracting States

Article 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Chapter IX

Amendment

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such

amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

(1)- If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification acceptance or approval, Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2)- No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the Jurisdiction of the Centre given before the date of entry into force of the amendment.

Chapter X

final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1)- This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2)- This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75

The depositary shall notify all signatory States of the following

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force, in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

“Done at Washington in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention.”

Appendix 11

The Convention of the Arab League of Nations concerning the Enforcement of Foreign Judgments and Awards* Done at Cairo, 15/09/1952

The Government of:

The Hashemite Kingdom of Jordan.
The Syrian Republic.
The Kingdom of Iraq.
The Kingdom of Saudi Arabia.
The Lebanese Republic.
The Kingdom of Egypt.
The Kingdom of Yemen (Metawakilia)

Desirous of facilitating among their several States the carrying out of execution of judgments, and in accordance with the provisions of Article 2 of the Pact of the Arab League, have agreed as follows:

Article 1.

Any final judgment involving civil or commercial rights or payments, any sentence imposed by the Courts having jurisdiction over penal matters, or matters concerning injuries, as well as all decisions relating to matters of personal status, made by the competent legal authorities in any of the member States of the Arab League, shall be executory in the other States of the League, in accordance with the provisions of this agreement.

Article 2.

The appropriate judicial authorities of the State which is requested to execute the sentence, shall not be allowed to investigate or review the subject matter of the case, and shall not refuse execution of the judgment, except under the following circumstances:

a- If the legal authority which rendered the judgment was not qualified to hear the case on account of the lack of jurisdiction or because of applicable principles of international law.

b- If the parties concerned were not properly and duly summoned.

c- If the sentence passed is contrary to the general order, or to the public policy of the State which is requested to carry out its execution. The said State shall decide whether the case is to be so considered, as also whether the execution of the sentence would be contrary to a recognised principle of international law.

d- If the Courts of the State which is requested to carry out the execution have already given judgment between the same parties on the same subject matter, or if a case is pending on the same subject and between the same parties, provided the

* This Convention was mentioned its English translation in the *Revue Egyptienne de Droit International*, vol. 8, 1952. pp. 333-35.

said case had been begun in the Court of the requested State prior to the date of its being begun and in the Court of the requesting State which gave verdict and asked execution.

Article 3.

With due consideration to Article 1 of this agreement, the authorities who are requested to enforce execution are not entitled to reconsider the verdict of arbitrators which have been given in any of the States of the League. Request of execution may be refused in the following instances:

a- If the laws of the requested State do not admit the solution of litigation by means of arbitration.

b- If the verdict passed was not in pursuance of a conditional arbitration agreement.

c- If the arbitrators were not qualified to act in pursuance of a conditional agreement of arbitration or in accordance with the provisions of the law under which the sentence was passed.

d- If the parties were not properly served with summons to appear.

e- If the arbitrators' decision includes anything considered to be against general order or public morals in the State requested to carry out execution. The requested State shall decide whether the case is to be considered as such and may refuse execution.

f- If the arbitrators' decision is not final in the State in which it is given.

Article 4.

The provisions of this agreement shall not be applicable to any judgment issued against the Government of the requested State or any of its officers in his official capacity and on account of the performance of his duties, nor shall they be applicable to judgments which are contrary to international treaties and agreements, in force in the requested State.

Article 5.

Requests for execution should be supported by the following documents:

a- A certified true copy of the judgment, duly authorised by responsible quarters.

b- The original summon of the text of judgment which is to be executed or an official certificate to the effect that the text of the judgment has been duly served.

c- A certificate from responsible authority to the effect that judgment is final and executory.

d- A certificate that the parties were duly served with summons to appear before the proper authorities or before the arbitrators in case the judgment or arbitrators' decision was by default.

Article 6.

Judgments which are to be executed in any State of the League shall have the same legal validity as in the requesting State.

Article 7.

In any of the States of the League, citizens of the requesting State shall not be asked to pay any fees, furnish any deposits or produce any securities, which they are not required to do in their country, nor is it permitted to deprive them of legal aid or exemptions from legal fees.

Article 8.

Each State will appoint a legal authority to which will be submitted all demands of execution demands, procedure and appeals against decisions taken in this respect. Communication of such appointment shall be made to each of the other Contracting States.

Article 9.

States which shall have accepted this agreement, shall confirm such acceptance in accordance with their own constitutional laws and procedure, at the earliest possible date. Documents of confirmation will be deposited with the General-Secretary of the League, which will prepare a memorandum of the deposit of each State's confirmatory documents and will inform the other signatories of this agreement.

Article 10.

States of the League who have not signed this agreement may adhere to the same before sending a notice to that effect to the General-Secretary of the League who will advise the other signatory of such adhesion.

Article 11.

This agreement will come into force a month from the date of deposit of confirmatory documents by three of the signatory States. For other States, it will come into effect a month from the date of deposit of their confirmatory documents or their notice of adhesion.

Article 12.

Any of the States bound by this agreement may withdraw therefrom, upon submitting a notice to that effect to the General Secretariat of the Arab States League. Withdrawal will be effective after the lapse of six months from the date of the notice. However, the provisions of this agreement will remain valid and binding for execution of demands submitted before the date of its expiration.